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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1942

No. 593

DIRECT SALES COMPANY, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 18, 1942.

CERTIORARI GRANTED MARCH 1, 1943.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 593

DIRECT SALES COMPANY, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

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[fol. 1] [Caption omitted]

[fol. 2] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF SOUTH CAROLINA

INDICTMENT

UNITED STATES OF AMERICA

vs.

DIRECT SALES COMPANY, DR. JOHN VICTOR TATE, GEORGE C. JOHNSON, CLYDE A. FOSTER, REEL B. BLACK

VIO: Section 88, Title 18, U. S. C. A. Conspiracy to violate the Harrison Narcotic Act

INDICTMENT—Filed May 26, 1941

UNITED STATES OF AMERICA,
Western District of South Carolina,
In the District Court, Greenwood Division:

At a regular term of the United States District Court for the Western District of South Carolina, begun and holden at Anderson, within and for the District aforesaid, on the fourth Monday in May, in the year of our Lord one thousand nine hundred and forty-one, the grand jurors of the United States, being duly empaneled, sworn, and charged to inquire in and for the District aforesaid, upon their oaths do present:

That Direct Sales Company is a corporation organized and existing under and by virtue of the laws of the State of New York, having its principal place of business at Buffalo, in said State, and is a manufacturer and wholesale dealer in opium, its salts and derivatives, including sulphate, and at the times hereinafter mentioned was registered as such under the provisions of Section 1 of an Act of Congress approved December 17, 1914, as amended by Act of Congress approved February 24, 1919, and commonly called the Harrison Narcotic Act;

That Dr. John Victor Tate is a citizen of the State of South Carolina, residing at Calhoun Falls, in Abbeville

County, in said State, and is a physician who was registered under the provisions of the said Act, in his proper class;

That the defendant, George C. Johnson, resides at Augusta, in the State of Georgia, and the defendants, Clyde A. Foster and Reel B. Black, are residents of Spartanburg, in the State of South Carolina, and they have not registered or paid the special tax in any class under the provisions of said Act;

[fol. 3] And the grand jurors aforesaid, upon their oaths aforesaid, do further present, that the said Direct Sales Company, a corporation, as aforesaid, Dr. John Victor Tate, George C. Johnson, Clyde Foster and Reel B. Black, heretofore, to wit, throughout the period commencing on or about May 1, 1933, to and including the tenth day of June, 1940, at Calhoun Falls, in Abbeville County, in the State of South Carolina, in the Greenwood Division of the Western District of South Carolina, and within the jurisdiction of this Court, did unlawfully, wilfully, and knowingly combine, conspire, confederate, and agree together that they would defraud the United States out of its revenues as provided by the terms of said Act, as amended, and that they would commit offenses against the United States of America by violating the provisions of Sections 1 and 2 thereof; that is to say, they would obtain large quantities of morphine sulphate by use of official order forms prescribed by the said Act, for purposes other than in the conduct of a lawful business in said drugs, or in the legitimate practice of medicine, and that they would sell, barter, exchange and give away said drugs, so obtained, without having registered in a classification under said Act permitting them so to do, and without having paid the special tax required, and that they would sell, barter, exchange and give away said drugs not in or from the original tax stamped packages, and not in pursuance of written order forms from the persons to whom sold, bartered, exchanged and given, and said unlawful purposes were to be accomplished in the following manner, to wit:

The Direct Sales Company, throughout the period herein mentioned, by means of circulars, catalogs and other advertising matter would and did induce the defendant, Dr. John [fol. 4] Victor Tate, to obtain from it by use of his official order forms, at frequent intervals, large quantities of morphine sulphate, then and there well knowing that said drugs

were obtained for a purpose other than the use, sale and distribution by him, the said Dr. John Victor Tate, in the conduct of a lawful business in said drugs, or in the legitimate practice of his profession; that upon receipt of said drugs by the defendant, Dr. John Victor Tate, from the defendant, Direct Sales Company, he, the said Dr. John Victor Tate, would and did sell, barter, exchange and give away the same in large quantities to the defendants, George C. Johnson, Clyde A. Foster and Reel B. Black, and other persons to the grand jurors aforesaid unknown, for the sole purpose of enabling said persons to satisfy their addiction to said drugs, and to sell and distribute the same to other persons in an unlawful manner, and said sales by the said Dr. John Victor Tate to the defendants, George C. Johnson, Clyde A. Foster, and Reel B. Black, and other persons unknown, were not mare pursuant to an order from said persons on a form prescribed for that purpose, and were not in or from the original stamped package; that after having so obtained the said narcotic drugs, they, the said George C. Johnson, Clyde A. Foster, and Reel B. Black, thereupon sold quantities of same to Doris Cox, Charles A. McWahan, Edith Davis, George Roller, and other persons to the grand jurors aforesaid unknown, and said sales were not made pursuant to any order forms from said persons to whom sold and were not made in or from the original stamped package, and same not being sold, bartered, exchanged, given away, dispensed and distributed under or by virtue of any of the exemptions and exceptions provided for in the said Act of Congress;

[fol. 5] *Overt Acts*

And the grand jurors aforesaid, upon their oaths aforesaid, do further present, that in pursuance of said felonious and unlawful conspiracy, confederation and agreement, and to effect the object of same, the said defendants, Direct Sales Company, Dr. John Victor Tate, George C. Johnson, Clyde A. Foster and Reel B. Black, at the times hereinafter mentioned, and within the jurisdiction of this Court, did do certain acts, that is to say:

1. That on or about May 1, 1933, and continuously thereafter until June 10, 1940, at intervals of approximately thirty days, the Direct Sales Company, Incorporated, sent by mail to Dr. John Victor Tate catalogs, price lists, and

other advertising matter, offering to sell, at stipulated prices, morphine sulphate and tablets of morphine sulphate in large quantities, and holding out to him certain discounts for the purchase of morphine sulphate and tablets of morphine sulphate in large quantities, thereby inducing Dr. John Victor Tate to purchase morphine sulphate and morphine sulphate tablets by means of official opium order forms from the Direct Sales Company, Incorporated, for purposes other than in the conduct of any lawful business or professional practice for which he, the said Dr. John Victor Tate, was properly registered under the provisions of Section 1, of the Act of Congress, as approved December 17, 1914, and as amended by the Act of Congress approved February 24, 1919, commonly known as the Harrison Narcotic Act.

2. That on November 26, 1937, said Direct Sales Company, Incorporated, sold and delivered to Dr. John Victor Tate 1000 H. T. morphine sulphate ½ grains, on Order Form No. A860571, dated November 24, 1937.

[fol. 6] 3. That on December 24, 1937, Direct Sales Company, Incorporated, sold and delivered to Dr. John Victor Tate 1000 H. T. morphine sulphate ½ grains, on Order Form No. A860573, dated December 22, 1937.

4. That on January 17, 1938, said Direct Sales Company, Incorporated, sold and delivered to the said Dr. John Victor Tate 1000 H. T. morphine sulphate ½ grains on Order Form No. A860575, dated January 16, 1938.

5. That on July 11 1938, said Direct Sales Company, Incorporated, sold and delivered to the said Dr. John Victor Tate 1000 H. T. morphine sulphate ½ grains, on Order Form No. B638623, dated July 9, 1938.

6. That on July 27, 1938, said Direct Sales Company, Incorporated, sold and delivered to the said Dr. John Victor Tate 1000 H. T. morphine sulphate ½ grains, on Order Form No. B638624, dated July 25, 1938.

7. That on August 15, 1938, said Direct Sales Company, Incorporated, sold and delivered to the said Dr. John Victor Tate 1000 H. T. morphine sulphate ½ grains, on Order Form B638627, dated August 10, 1938.

8. That on August 29, 1938, said Direct Sales Company, Incorporated, sold and delivered to the said Dr. John Victor

Tate 1000 H. T. morphine sulphate ½ grains, on Order Form B638630, dated August 26, 1938.

9. That on December 5, 1938, said Direct Sales Company, Incorporated, sold and delivered to the said Dr. John Victor Tate 1000 H. T. morphine sulphate ½ grains, on Order Form No. C173, dated December 2, 1938.

[fol. 7] 10. That on December 16, 1938, the said Direct Sales Company, Incorporated, sold and delivered to the said Dr. John Victor Tate 1000 H. T. morphine sulphate ½ grains, on Order Form No. C176, dated December 14, 1938.

11. That on December 29, 1938, said Direct Sales Company, Incorporated, sold and delivered to Dr. John Victor Tate 1000 H. T. morphine sulphate ½ grains, on Order Form No. C178, dated December 27, 1938.

12. That on February 6, 1939, said Direct Sales Company, Incorporated, sold and delivered to the said Dr. John Victor Tate 1000 H. T. morphine sulphate ½ grains on Order Form No. C2203, dated February 2, 1939.

13. That on February 16, 1939, said Direct Sales Company, Incorporated, sold and delivered to the said Dr. John Victor Tate 1000 H. T. morphine sulphate ½ grains, on Order Form C2205, dated February 14, 1939.

14. That on February 24, 1939, said Direct Sales Company, Incorporated, sold and delivered to the said Dr. John Victor Tate 1000 H. T. morphine sulphate ½ grains, on Order Form C2207, dated February 24, 1939.

15. That on June 13, 1939, said Direct Sales Company, Incorporated, sold and delivered to the said Dr. John Victor Tate 1000 H. T. morphine sulphate ½ grains, on Order Form C407166, dated June 10, 1939.

16. That on June 20, 1939, said Direct Sales Company, Incorporated, sold and delivered to the said Dr. John Victor Tate 1000 H. T. morphine sulphate ½ grains, on Order Form C407166, dated June 10, 1939.

[fol. 8] 17. That on June 27, 1939, said Direct Sales Company, Incorporated, sold and delivered to the said Dr. John Victor Tate 1000 H. T. morphine sulphate ½ grains, on Order Form C407168, dated June 16, 1939.

18. That on June 30, 1939, said Direct Sales Company, Incorporated, sold and delivered to the said Dr. John Victor Tate 1000 H. T. morphine sulphate ½ grains, on Order Form C407169, dated June 26, 1939.

19. That on July 6, 1939, said Direct Sales Company, Incorporated, sold and delivered to the said Dr. John Victor Tate 1000 H. T. morphine sulphate ½ grains, on Order Form No. C407170, dated June 28, 1939.

20. That on November 6, 1939, said Direct Sales Company, Incorporated, sold and delivered to the said Dr. John Victor Tate 1000 H. T. morphine sulphate ½ grains, on Order Form D66773, dated October 28, 1939.

21. That on November 13, 1939, said Direct Sales Company, Incorporated, sold and delivered to the said Dr. John Victor Tate 1000 H. T. morphine sulphate ½ grains, on Order Form No. D66774, dated November 4, 1939.

22. That on November 13, 1939, said Direct Sales Company, Incorporated, sold and delivered to Dr. John Victor Tate 1000 H. T. morphine sulphate ½ grains, on Order Form No. D66776, dated November 11, 1939.

23. That on November 22, 1939, said Direct Sales Company, Incorporated, sold and delivered to Dr. John Victor Tate 1000 H. T. morphine sulphate ½ grains, on Order Form No. D66777, dated November 13, 1939.

[fol. 9] 24. That on November 27, 1939, said Direct Sales Company, Incorporated, sold and delivered to the said Dr. John Victor Tate 1000 H. T. morphine sulphate ½ grains, on Order Form No. D66779, dated November 20, 1939.

25. That on June 16, 1939, at Calhoun Falls, South Carolina, Dr. John Victor Tate sold to the defendant, George C. Johnson, in an original stamped package, bearing the label of the Direct Sales Company, Incorporated, 100 H. T. morphine sulphate ½ grains.

26. That on September 23, 1939, at Calhoun Falls, South Carolina, the said Dr. John Victor Tate sold to Ruby LaMar, in an unstamped and unlabeled package, 100 H. T. morphine sulphate ½ grains.

27. That on September 30, 1939, at Calhoun Falls, South Carolina, the said Dr. John Victor Tate sold to Ruby LaMar.

in an unlabeled and unstamped package, 100 H. T. morphine sulphate ½ grains.

28. That on October 5, 1939, at Calhoun Falls, South Carolina, the said Dr. John Victor Tate sold to Ruby LaMar, in an unstamped and unlabeled package, 100 H. T. morphine sulphate ½ grains.

29. That on October 11, 1939, at Calhoun Falls, South Carolina, the said Dr. John Victor Tate sold to Ruby LaMor, in an unstamped and unlabeled container, 100 H. T. morphine sulphate ½ grains.

30. That on October 14, 1939, the said Dr. John Victor Tate, at Calhoun Falls, South Carolina, sold to Albert P. Rogers, in an unstamped and unlabeled container, 200 H. T. morphine sulphate ½ grains.

31. That on October 14, 1939, at Calhoun Falls, South [fol. 10] Carolina, the said Dr. John Victor Tate sold to Ruby LaMar, in an unstamped and unlabeled container, 100 H. T. morphine sulphate ½ grains.

32. That on October 21, 1939, the said Dr. John Victor Tate, at Calhoun Falls, South Carolina, sold to Albert P. Rogers, in an original bottle bearing mutilated label of said Direct Sales Company, Incorporated, 200 H. T. morphine sulphate ½ grains.

33. That on October 21, 1939, at Calhoun Falls, South Carolina, the said Dr. John Victor Tate sold to Ruby LaMar, in an unstamped and unlabeled container, 100 H. T. morphine sulphate ½ grains.

34. That on November 4, 1939, at Calhoun Falls, South Carolina, the said Dr. John Victor Tate sold to Ruby LeMar, in an unstamped and unlabeled container 97 H. T. sulphate ½ grains.

35. That on November 4, 1939, at Calhoun Falls, South Carolina, the said Dr. John Victor Tate sold to Albert P. Rogers, in two unstamped and unlabeled containers, 202 H. T. morphine sulphate ½ grains.

36. That on November 11, 1939, at Calhoun Falls, South Carolina, the said Dr. John Victor Tate sold to Ruby LaMar, in an unstamped and unlabeled container, 96 H. T. morphine sulphate ½ grains.

37. That on November 11, 1939, at Calhoun Falls, South Carolina, the said Dr. John Victor Tate sold to Albert P. Rogers, in two unstamped and unlabeled containers, 200 H. T. morphine sulphate ½ grains.

38. That on November 18, 1939, at Calhoun Falls, South Carolina, the said Dr. John Victor Tate sold to Ruby LaMar, in an unstamped and unlabeled container, 100 H. T. morphine sulphate ½ grains.

[fol. 11] 39. That on November 18, 1939, the said Dr. John Victor Tate, at Calhoun Falls, South Carolina, sold to Albert P. Rogers, in two unstamped and unlabeled containers, 200 H. T. morphine sulphate ½ grains.

40. That on or about September 28, 1939, at Calhoun Falls, South Carolina, Dr. John Victor Tate sold to the defendant, George C. Johnson, 400 H. T. morphine sulphate ½ grains.

41. That on or about October 10, 1939, the said Dr. John Victor Tate, at Calhoun Falls, South Carolina, sold to the defendant, George C. Johnson, 500 H. T. morphine sulphate ½ grains.

42. That on or about January 4, 1940, at Calhoun Falls, the said Dr. John Victor Tate sold to one Claude Rhodes, 100 H. T. morphine sulphate ½ grains.

43. That on or about January 10, 1940, at Calhoun Falls, South Carolina, the said Dr. John Victor Tate sold to Claude Rhodes 100 H. T. morphine sulphate ½ grains.

44. That on or about January 15, 1940, at Calhoun Falls, South Carolina, the said Dr. John Victor Tate sold to Claude Rhodes 100 H. T. morphine sulphate ½ grains.

45. That on or about January 4, 1940, at Calhoun Falls, South Carolina, the said Dr. John Victor Tate sold to Roy Wells 100 H. T. morphine sulphate ½ grains.

46. That on or about January 10, 1940, at Calhoun Falls, South Carolina, the said Dr. John Victor Tate sold to Roy Wells 100 H. T. morphine sulphate ½ grains.

47. That on or about January 15, 1940, at Calhoun Falls, South Carolina, the said Dr. John Victor Tate sold to Roy Wells 100 H. T. morphine sulphate ½ grains.

[fol. 12] 48. That on or about January 19, 1940, at Calhoun Falls, South Carolina, the said Dr. John Victor Tate sold to Roy Wells 100 H. T. morphine sulphate ½ grains.

49. That on or about September 15, 1939, the defendant, George C. Johnson, at Augusta, Georgia, sold to Clyde A. Foster and Reel B. Black 150 H. T. morphine sulphate ½ grains, not in pursuance of a written order from the said Clyde A. Foster and the said Reel B. Black on a form issued in blank for that purpose by the Commissioner of Internal Revenue.

50. That on or about September 19, 1939, the defendant, George C. Johnson, sold to the defendant, Clyde A. Foster, at Spartanburg, South Carolina, 300 H. T. morphine sulphate ½ grains, not in pursuance of a written order from the said Clyde A. Foster on a form issued in blank for that purpose by the Commissioner of Internal Revenue.

51. That on or about September 21, 1939, the defendant, George C. Johnson, sold to the defendant, Clyde A. Foster, at Spartanburg, South Carolina, 300 H. T. morphine sulphate ½ grains, not in pursuance of a written order from the said Clyde A. Foster, on a form issued in blank for that purpose by the Commissioner of Internal Revenue.

52. That on or about September 29, 1939, at Spartanburg, South Carolina, the defendant, George C. Johnson, sold to the defendant, Clyde A. Foster, 84 H. T. morphine sulphate ½ grains, not in pursuance of a written order from the said Clyde A. Foster, on a form issued in blank for that purpose by the Commissioner of Internal Revenue.

[fol. 13] 53. That on or about September 19, 1939, the defendant, Clyde Al Foster, at Spartanburg, South Carolina, sold to Reel B. Black 100 H. T. morphine sulphate ½ grains, not in pursuance of a written order from the said Reel B. Black, on a form issued for that purpose by the Commissioner of Internal Revenue.

Conclusions

And so the grand jurors aforesaid, upon their oaths aforesaid, do say that the said defendants, Direct Sales Company, Incorporated, Dr. John Victor Tate, George C. Johnson, Clyde A. Foster and Reel B. Black, throughout the period of time mentioned in this indictment, and at the

places and in the manner and form aforesaid, unlawfully, wilfully, feloniously, and knowingly did conspire, combine, confederate and agree together to commit certain offenses against the United States, and do say that the overt acts, and all overt acts therein alleged to have been committed, were committed in furtherance of said conspiracy, knowingly, wilfully, fraudulently, and feloniously by the said defendants, and to effect the object and purpose of the same contrary to the form of the statute of the United States in such case made and provided, and against the peace and dignity of the United States of America.

O. H. Doyle, United States Attorney.

[fol. 14] Nol prossed this January 12, 1942, as to the defendant, Clyde Foster, by authority of the Attorney General.

(S.) E. P. Riley, Asst. U. S. Attorney.

Witnesses: W. F. Weatherwax, J. M. Bransky, A. P. Rogers.

[Endorsed:] No. 8460. United States District Court, Western District of South Carolina, Greenwood Division. The United States of America vs. Direct Sales Company, Dr. John Victor Tate, George C. Johnson, Clyde A. Foster, Reel B. Black, Abbeville County. Indictment. Vio: Section 88, Title 18, U. S. C. A.—Conspiracy to violate the Harrison Narcotic Act. A True Bill. (S.) T. B. Sumerel, Foreman. Filed May 26, 1941. Bail, $—. W. D. White, Clerk.

PLEA

The defendant, Direct Sales Company, Incorporated by its President, Geo. J. Dotterweich waives arraignment and pleads Not Guilty in open court this Nov. 10, 1941.

—— ——, Defendant.

VERDICT

We, the jury, find the defendant, Direct Sales Company, Incorporated, Guilty this 13th day of November, 1941.

(S.) John D. Bell, Foreman.

[fol. 15] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

SUMMONS—Filed June 19, 1941

The President of the United States:

To the Defendant, Direct Sales Company, Incorporated; a Corporation, Buffalo, New York:

Whereas, a true bill was found by the grand jury of the United States of America for the Western District of South Carolina, on May 26, 1941, at Anderson, South Carolina, against you, Dr. John Victor Tate, George C. Johnson, Clyde A. Foster, and Reel B. Black, charging you with conspiracy to violate the Harrison Narcotic Act, throughout the period commencing on or about May 1, 1933, to and including June 10, 1940,

You Are Hereby Summoned, Commanded and Directed to be and appear before the United States District Court for the Western District of South Carolina on the first Monday in November, A. D., 1941, at Greenwood, South Carolina, at the hour of ten o'clock in the forenoon, then and there to enter an appearance in the said case, and to answer to the charges in the said indictment;

Herein Fail Not under penalty of a default being entered against you and other penalties imposed according to law.

Witness the Honorable C. C. Wyche, United States District Judge for the Western District of South Carolina, at Greenville, this the 19th day of June, in the year of our Lord one thousand nine hundred and forty-one, and in the one hundred and sixty-fifth year of the Independence of the United States of America.

(S.) W. D. White, Clerk, United States District Court for the Western District of South Carolina.

(S.) C. H. Doyle, United States Attorney, Western District of South Carolina.

I hereby certify and return that on the 19th day of June, 1941, I received the within summons and that after diligent search I am unable to find the within named Direct Sales

Co. within my district, and my information is that this company is a corporation of the state of New York, and has no place of business in this District.

Reuben Gosnell, U. S. Marshal, by (S.) J. W. Bradley, Deputy.

[fol. 16] RETURN ON SERVICE OF WRIT

UNITED STATES OF AMERICA,
Western District of New York, ss:

I hereby certify and return that I served the annexed Summons on the therein-named Direct Sales Company, Inc. by handing to and leaving a true and correct copy thereof with George Dotterweich, Pres., Direct Sales Company, Inc. personally at Buffalo, N. Y. in said District on t. 7th day of August, A. D. 1941.

F. C. Blackford, U. S. Marshal, by Julius Goettelman, Jr., Deputy.

[File endorsement omitted.]

[fol. 17] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

SUMMONS—Filed August 4, 1941

The President Of The United States:

To The Defendant, Direct Sales Company, Incorporated, a corporation, Buffalo, New York:

Whereas, a true bill was found by the grand jury of the United States of America for the Western District of South Carolina, against you, Dr. John Victor Tate, George C. Johnson, Clyde A. Foster, and Reel B. Black, charging you with conspiracy to violate the Harrison Narcotic Act, throughout the period commencing on or about May 1, 1933, to and including June 10, 1940, You Are Hereby Summoned, Commanded And Directed to be and appear before the United States District Court for the Western District of South Carolina on the 3rd day of November, A. D., 1941, at Greenwood, South Carolina, at the hour of ten o'clock in

the forenoon, then and there to enter an appearance in the said case, and to answer to the charges in the said indictment; Herein Fail Not, otherwise suffer the penalties imposed by law.

Witness The Honorable C. C. Wyche, United States District Judge for the Western District of South Carolina, at Greenville, this the 4th day of August, in the year of our Lord one thousand nine hundred and forty-one, and in the one hundred and sixty-fifth year of the Independence of the United States of America.

W. D. White, Clerk, United States District Court for the Western District of South Carolina. (Seal.)

[fol. 18] RETURN ON SERVICE OF WRIT

UNITED STATES OF AMERICA,
Western District of New York, ss:

I hereby certify and return that I served the annexed Summons To United States Marshal For The Western Dist. Of New York on the therein-named Direct Sales Company, Inc. by handing to and leaving a true and correct copy thereof with George Dotterweich, Pres., Direct Sales Company, Inc. personally at Buffalo, N. Y. in said District on the 7th day of August, A. D. 1941.

F. C. Blackford, U. S. Marshal. By Julius Goettelman, Jr., Deputy.

[File endorsement omitted.]

[fol. 19] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

SUMMONS TO UNITED STATES MARSHAL FOR THE WESTERN DISTRICT OF NEW YORK—Filed August 4, 1941

To The United States Marshal For The Western District Of New York:

Pursuant to the order of Honorable C. C. Wyche, United States District Judge for the Western District of South Carolina, a certified copy of which is hereto attached, you

are hereby commanded to summon the defendant, Direct Sales Company, a corporation under the laws of New York with its principal place of business at Buffalo in the Western District of South Carolina on the 3rd day of November, 1941, at ten o'clock in the forenoon to plead to and answer the charge in the indictment in the above entitled case; and you are required to summon the said defendant by delivering to the highest officer of the corporation a summons directed to the Direct Sales Company, to which summons will be attached a certified copy of the said indictment, and you will make your return thereon to this Court.

Witness the Honorable C. C. Wyche, United States District Judge for the Western District of South Carolina, at Greenville, S. C., this *4th* day of August, in the year of our Lord one thousand nine hundred and forty-one and in the one hundred and sixty-fifth year of the Independence of the United States of America.

W. D. White, Clerk, United States District Court for the Western District of South Carolina. (Seal.)

[fol. 20] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER DIRECTING ISSUANCE OF SUMMONS—Filed August 4, 1941

It appearing to the Court that a True Bill was returned by the Grand Jury of the United States of America for the Western District of South Carolina on May 26th, 1941, at Anderson, S. C., against the above named defendants upon an indictment charging them with conspiracy to violate the provisions of the Harrison Narcotic Act, as amended, throughout the period commencing on or about May 1st, 1933, and including June 10th, 1940; and it further appearing that the defendant, Direct Sales Company, is a corporation organized under the laws of the State of New York and having its principal place of business at Buffalo in the Western District of New York and that it cannot be served with process in the Western District of South Carolina, it is, therefore,

Ordered, that the Clerk of this Court issue a summons addressed to the United States Marshal for the Western District of New York commanding him to summon the corporate defendant Direct Sales Company to appear in this District on November 3rd, 1941, at Greenwood, South Carolina, at ten o'clock in the forenoon, then and there to answer to the charges in said indictment. Let a certified copy of the indictment be served on said corporate defendant with the summons.

(Signed) C. C. Wyche, United States District Judge for the Western District of South Carolina.

Spartanburg, S. C.
August 2, 1941.

[fols. 21-22] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

RETURN ON SERVICE OF WRIT—Filed June 30, 1941

UNITED STATES OF AMERICA,
Western District of New York, ss:

I hereby certify and return that I served the annexed Summons & Cert. Copy Of Indictment C-8460 on the therein-named Direct Sales Company, Inc. by handing to and leaving a true and correct copy thereof with George Dotterwich, Jr., Vice Pres., Direct Sales Company, Inc. personally at Buffalo, N. Y. in said District on the 27th day of June, A. D. 1941.

F. C. Blackford, U. S. Marshal. By Julius Goettelman, Jr., Deputy.

Travel	$ .20
Fees	4.00
	4.20

[fol. 23] IN DISTRICT COURT OF THE UNITED STATES, WESTERN DISTRICT OF SOUTH CAROLINA

UNITED STATES OF AMERICA, Plaintiff,

against

DIRECT SALES COMPANY, INC., DR. JOHN VICTOR TATE, GEORGE C. JOHNSON, CLYDE A. FOSTER and REEL B. BLACK, Defendants

Bill of Exceptions—Filed July 23, 1942

This is a criminal action, wherein the defendant, appellant, Direct Sales Company, Inc., was indicted together with Dr. John Victor Tate, et al., on a charge of conspiracy to violate the Harrison Narcotic Act, throughout the period commencing May 1, 1933 and ending June 10, 1940. A true bill was found by the grand jury of the United States of America for the Western District of South Carolina and said indictment was filed on May 26, 1941. That thereafter and on August 4, 1941, pursuant to order of Hon. C. C. Wyche, a summons was issued by W. D. White, Clerk of the United States District Court for the Western District of South Carolina, directing defendant, Direct Sales Company, Inc., to appear in District Court at Greenwood, South Carolina on November 3, 1941, to enter an appearance and answer the charges in said indictment.

That on August 5, 1941, the defendant, appellant filed its plea in abatement as follows:

PLEA IN ABATEMENT—Filed August 5, 1941

And now comes the defendant Direct Sales Company, Inc., and by its officers attorney and makes its plea in abatement to the indictment returned to this Court by the Grand Jury thereof at a term of this Court, held in the Federal Building in the City of Anderson, South Carolina, commencing on the 26th day of May, 1941.

First: Upon information and belief that said indictment [fol. 24] was found and returned by the said Grand Jurors without receiving or having presented to them or knowing of any evidence whatsoever of the facts alleged or the accusations made therein as to this particular defendant. That the only testimony and evidence presented to said Grand Jurors at the said session of the May 1941 term of this

Court was the testimony concerning the fact that this defendant corporation had sold quantities of morphine sulphate to Dr. John Victor Tate between May 1, 1933 and June 1, 1940, and that it distributed catalogs and circulars; and that the United States of America did not produce or offer to or before the Grand Jurors any lawful or other evidence whatsoever against this defendant.

That the United States of America did not offer to or before said Grand Jurors, any witness or testimony that the defendant Direct Sales Company, Inc., was a duly licensed manufacturer and wholesale dealer in opium and coca leaves under Section I of the Act of Congress of December 17, 1914, as amended by Sections 703 and 704 of the Revenue Act of 1926, the Act of January 22, 1927 and the Act of March 3, 1927, and that it had paid its tax to the United States Government pursuant to said aforementioned Acts and the Regulations of the Treasury Department and that it was duly authorized to manufacture and sell opium and its derivatives to physicians pursuant to the statute and regulations.

That defendant, nor its agents or employees, had no contacts, agreements, conversations or transactions with defendants George C. Johnson, Clyde A. Foster or Reel B. Black and in fact did not know of the existence of such individuals until it read their names contained in the indictment in the present case after a copy of the same was served by a United States Marshal in the City of Buffalo, New York, in July, 1941.

That Dr. John Victor Tate was a physician duly registered under the provisions of the Harrison Narcotic Act, and pos- [fol. 25] sessed Registry Number 1378 Class 4.

That, pursuant to the Act of Congress, December 17, 1914 and its amendments, as well as Article 67 and 68 of Regulations of Treasury Department of the United States, Dr. Tate applied to and secured from Robert M. Cooper and W. P. Bowers, Collectors of Internal Revenue at Columbia, South Carolina, order forms and paid the special tax therefor and the same were issued to Dr. Tate with his name thereon, his address, his Registry No. 1378, Class 4, and the date and the Collector's name thereon; that over a period of years the Direct Sales Company, Inc., received these orders from Dr. Tate and pursuant to the Statute and Treas-

ury Department regulations sold the morphine sulphate contained in such duly licensed order forms.

That Defendant never sold any merchandise, including morphine sulphate to Dr. Tate except pursuant to proper order form issued by the Collector of Internal Revenue and solely in the conduct of a lawful business as wholesaler.

That pursuant to the Act of March, 1914, Section I, its amendments and the Regulations of the Treasury Department, Article 57, the defendant Direct Sales Company, Inc., each and every month filed with the Collector of Internal Revenue at Buffalo, New York, a written record on forms 810 and 810a and 810b, furnished by said collector wherein it complied with Section I of the so-called Harrison Narcotic Law as well as Article 57 of the Regulations of the Treasury Department and the Commissioner of Internal Revenue; that forms 810, 810a, 810b and 810c were furnished to the defendant Direct Sales Company, Inc., by the office of the Internal Revenue Bureau (Narcotic Bureau) at Buffalo, New York and were properly and legally executed and filed according to the Statute and regulations; that in said reports in form 810c, there was contained a statement in detail of the quantity of taxable narcotic drugs [fol. 26] and preparations, disposed of during the preceding month by this defendant and contained the date of registry, number of the purchaser, his name, address, the district in which he or it was registered, the name and quantity of the drug sold and the amount of tax thereon; that all monthly reports so submitted by Direct Sales Company, Inc., contained the name of Dr. John Victor Tate and the quantity of drug sold to him, provided he was a purchaser during the particular month that was being reported at that time. That these forms were prepared in duplicate, the original of which was filed with the Commissioner of Internal Revenue at the City of Buffalo, New York and the duplicate originals will be produced upon this argument relative to this plea in abatement.

That the Government failed to produce evidence before the Grand Jury, showing that all sales made by this defendant to John Victor Tate were made pursuant to written order on blanks furnished by the Commissioner of Internal Revenue to the said John Victor Tate which contained his registry number and, which, when received by the Defendant were in regular order and were filed by the

Defendant pursuant to the statute and regulation. All these blanks will be produced at the time of the argument of this plea.

That the United States Government produced no evidence to the Grand Jury, setting forth the fact that no maximum amount, either in the Statute or the Regulations of the Treasury Dept. is placed upon the quantity which may be contained in a properly executed order blank from persons or business legally registered under the Act. In this connection, the defendant received a request from the Treasury Department, Bureau of Narcotics, Washington, D. C. in or about October, 1936, wherein the Commissioner of Narcotics requested that no physician be supplied in excess of 1000 half grain tablets or their equivalent on any one order. That this defendant complied with such request [fol. 27] and, in one instance where an order was received for more than the maximum amount suggested by the Commissioner of Narcotics, this defendant refused to fill the said order in excess of the suggested maximum amount.

That the Government did not produce evidence that the Commissioner of Narcotics prepared what is commonly known as a "black list", containing names of persons, including physicians located throughout the United States, to whom no sales of narcotics should be made without consulting the said commissioner's office; that defendant received several of these lists from the Commissioner of Narcotics and upon receipt of all orders even though regular in form, where they involved the purchase of narcotics, resource would be had to such list and no sales or transactions, of any description, were made by the defendant with any of the persons appearing thereon; that the name of Dr. John Victor Tate never appeared on any of the lists issued by the Commissioner of Narcotics as received by the defendant.

That the foregoing is all the evidence adduced before the said Grand Jury upon which the within indictment was found.

All of the foregoing to the manifest injury and prejudice of the said Direct Sales Company, Inc.

Wherefore, this defendant, Direct Sales Company, Inc., prays judgment if the United States Government ought further to prosecute the said indictment herein against

it in respect to said event in said indictment mentioned and that it, the said defendant, Direct Sales Company, Inc., may be dismissed and discharged of and from the said indictment and that the Court may be fully satisfied of the truth of the matters, facts and allegations above set forth, in case of the denial of same and in furtherance of justice, an investigation of the minutes of the Grand Jurors which returned the said indictment be had by the Court and by the [fol. 28] attorney for this defendant and that the United States District Attorney or his assistant in charge of the presentation of said cause to the said Grand Jury of May, 1941 term of this Court and the Grand Jurors themselves be summoned before this Court and be interrogated by the attorneys and counsel for this defendant as to the testimony adduced before them in this case.

August 4, 1941.

Direct Sales Company, Inc. George J. Dotterweich, President. William B. Mahoney, Atty. for the Defendant, Office & P. O. Address, 405 Wallbridge Building, Buffalo, New York.

Duly sworn to by George J. Dotterweich. Jurat omitted in printing

[fol. 29] That on August 11, 1941, the defendant appellant filed its demurrer to said indictment as follows:

DEMURRER—August 11, 1941

SIR:

The defendant, Direct Sales Company, demurs to the indictment herein on the following grounds:

First: That the said indictment does not state facts sufficient to constitute a crime against the United States by the defendant, Direct Sales Company.

Second: That the indictment insofar as the defendant, Direct Sales Company, is concerned is in conflict with the fifth and sixth amendments to the Constitution of the United States being too indefinite and a delegation by Congress

of legislative powers to Courts and juries to determine what acts are criminal.

Yours, etc.,

William B. Mahoney, Attorney for Defendant, Direct Sales Company, Office & P. O. Address, 405 Walbridge Building, Buffalo, New York.

To: O. H. Doyle, United States District Attorney, Western District of South Carolina, Greenville, South Carolina.

ORDER ALLOWING EXCEPTION

That thereafter an order was made and entered on September 25, 1941 allowing exception to the ruling of the Court on the plea in abatement and demurrer to the indictment:

On September 19, 1941, this Court handed down its opinion and ruling whereby the plea in abatement and demurrer to the indictment herein filed on behalf of the defendant, Direct Sales Company, Inc., was overruled, and counsel [fol. 30] for said defendant, Direct Sales Company, Inc., having requested that an exception be allowed to the ruling of the Court,

It is, therefore, ordered, that an exception be, and the same is hereby, allowed to the ruling of the Court on said plea in abatement and demurrer to the indictment.

(Signed) C. C. Wyche, United States District Judge.

Spartanburg, S. C., September 25, 1941.

[fol. 31] IN THE UNITED STATES DISTRICT COURT

UNITED STATES OF AMERICA,

vs.

DIRECT SALES COMPANY, INC., DR. JOHN VICTOR TATE, GEORGE C. JOHNSON, CLYDE A. FOSTER, REEL B. BLACK, Defendants

OPINION OVERRULING ABATEMENT ON DEMURRER—Filed September 20, 1941

To the indictment in this cause the defendant, Direct Sales Company, has filed a Plea in Abatement and a Demurrer.

Stated briefly, the basis of the Plea in Abatement is that there was not sufficient evidence before the grand jury upon which to predicate the finding of a true bill. Various evidentiary facts are alleged affirmatively by this defendant, and it is stated upon information and belief that these facts were not called to the attention of the grand jury. These evidentiary facts may or may not be relevant upon a trial of the case. The questions for consideration, therefore, are, (1) Does the Court have the right to inquire into the proceedings of the grand jury in order to determine the sufficiency or insufficiency of the testimony upon which a true bill was found; and, (2) Assuming such right exists, are the allegations and proof submitted with the plea sufficient to justify the Court in its discretion to inquire into the proceedings? There are no allegations of irregularity or fraud. The prayer of the plea is that this defendant may be dismissed from the indictment * * * and that the Court may be fully satisfied of the truth of the matters, facts and allegations above set forth, in case of the denial of same and in furtherance of justice an investigation of the minutes of the Grand Jurors which returned the said indictment be had by the Court and by the attorney for this defendant and that the United States District Attorney or his assistant in charge of the presentation of said cause to the said Grand Jury of May, 1941, term of this Court and the Grand Jurors themselves be summoned before this Court and be interrogated by the attorneys and counsel [fol. 32] for this defendant as to the testimony adduced before them in this case."

The decisions on the questions presented are not at all uniform, but by far the greater weight of the authorities is to the effect that the Courts have no right to grant such relief as the defendant prays for.

There is no federal statute regulating proceedings before a grand jury or specifying the kind and degree of evidence necessary to the finding of a true bill. Nor is there a statute of the State of South Carolina on the subject. A number of the states do have such statutes, and the variations of their requirements have given rise to a divergence of opinion on the questions now before the Court. In the jurisdictions which are opposed to an inquiry into the sufficiency of the evidence on which an indictment is based, the reasons are mainly that the secrecy of the grand jury

proceedings will not be invaded, and that statutes prescribing the grounds on which motions to quash may be made not mentioning insufficiency of the evidence is conclusive that such ground is not a valid one. In the absence of a statute on the subject the Common Law Rule will prevail, and that is the rule followed by the Supreme Court of the State of South Carolina in State v. Boyd, 2 Hill's Law, 288. Defendant in that case moved to quash the indictment on the ground, among others, that written statements of witnesses were received in evidence, when they should have been examined in person. The Presiding Judge refused the motion and an appeal was taken. Justice Harper, speaking for the Court, said: "With respect to the second ground, I am of opinion that the Court will, in no instance, inquire into the character of the testimony which has influenced the grand jury in finding an indictment with the view of quashing the indictment." And again the Court said: "The nature of the grand juror's oath sufficiently indicates that they are not to communicate to others that which passes among the jurymen in their consultation, and I think the juror who made the affidavit in the present instance was guilty of a violation of duty."

[fol. 33] In State v. Rector (S. C.) 155 S. E. 385, 158 S. C. 212, the Supreme Court of South Carolina said: "As long as the Grand Jury has been known to our judicial system, and that body came with the organization of our first courts, their acts and proceedings have been regarded as almost sacredly secret." And again, "From the pronouncements of the given authorities, it is plain that the general rule observed in all jurisdictions, to which there is no exception, except where made by proper legislation, forbids any inquiry into the proceedings of a grand jury. Our decisions show that our courts have adhered strictly to that rule. No one, not even the presiding judge, may invade the secrecy of the grand jury's deliberations, to inquire what influenced them in their acts or to ascertain how any member may have voted."

A grand jury is an informing and accusing body rather than a trial body. Its duty is to inquire and investigate. It is not the function of a grand jury to determine the guilt or the innocence of a person accused of crime. That is the duty imposed upon the petit jury. In order to find a true bill it is necessary only that the grand jury determine from

the evidence that the person charged is probably guilty. Its duty is to decide from the evidence offered whether there is a prima facie ground for criminal prosecution. State v. Bramlett (S. C.) 166 S. C. 323, 164 S. E. 873.

There is an extensive note on the question under consideration in 31 *A. L. R.*, beginning at page 1479. There many decisions from various jurisdictions have been collected, and it appears that the overwhelming majority rule is to the effect that the courts may not inquire into the legality or sufficiency of the evidence on which an indictment is based, the rule going so far in a great many jurisdictions as to hold that such inquiry may not be made even though it is averred that the indictment was found without *any* legal evidence being produced before the grand jury. It would also seem that the minority rule permits an inquiry into the proceedings of the grand jury only when it ap- [fol. 34] pears that the indictment was found without the production of any legal evidence, and in the jurisdictions so holding, the decisions turn largely upon the state statutes prescribing the kind and degree of evidence upon which a grand jury may act. There is another rule, known as "Rule in New York". It appears that the courts of the State of New York, while in the main following the minority rule, go further than those of any other jurisdiction in weighing the evidence produced before the grand jury, but even that rule does not sanction the relief prayed for in the instant motion. In *People* v. *Steinhardt*, 47 Misc., 252, 93 N. Y. Supp. 1026, the Court said: "I take it that the inherent power of the Court to set aside indictments is limited to cases where the indictment is found without evidence, or wholly upon illegal and incompetent testimony, and the cases where the indictment is based in part upon the testimony of the defendant, compelled to be a witness in violation of his constitutional rights."

The reasons for the majority rule are very well stated in the case of *State of New Mexico* v. *Chance*, 221 Pacific 183, reported also in 31 A. L. R. 1466: "The proceedings of the grand jury throughout legal history have always been secret. It is a judicial tribunal with inquisitorial powers, and, unless there is some clear statutory authority to do so, we think the courts are without power to review its action, to determine whether or not it had sufficient or insufficient, legal or illegal, competent or incompetent, evidence upon which to return an indictment. To hold otherwise would

permit every person who is indicted to present a plea in abatement, charging that no evidence had been submitted to or received by the grand jury, upon which such indictment could have been, or was in fact, returned, and then, upon a hearing had upon such plea, introduce the witnesses who appeared before such grand jury, and ascertain the facts which were submitted to the grand jury and to which they would likely testify upon the trial, thereby ascertaining the evidence available to the state to which the accused would be called upon to respond, thus injecting into our [fol. 35] judicial system a new and highly objectionable procedure."

In *United States* v. *Swift*, (D. C. 111.) 186 Fed. 1002, the court said: "The cases are uniform to the effect that, except in those states in which, by statute, indictments are required to be returned on 'legal' or 'competent' evidence, the courts will not review the evidence received by a grand jury for the purpose of passing upon its competency. In the first place, no official record of the evidence introduced before the grand jury ordinarily is kept. In the second place, if, on a motion to quash, the competency of the evidence presented could be inquired into, the trial courts would be obliged to sit as courts of review, to examine into the corrections of every ruling made upon the evidence by the grand jurors. The obstructions to justice and the unnecessary and uncalled-for waste of time, and consequent expense to the state as well as to defendants, which would result from such a course, are too obvious to need comment."

The rule in the State of New York being far more favorable to the position of the defendant than the rule in any other jurisdiction, the following is quoted from *United States* v *Gould*, (D. C. N. Y. 253 Fed. 239, to show that even the liberality of that rule does not permit the relief prayed for in this case upon the allegations of the plea made: "While I have no difficulty in declaring that in extreme cases of positive allegations of fraud or corruption, or positive allegations that no evidence of any kind had been admitted, and therefore the indictment was the result of caprice, and not the expression of a fair judgment on the facts, it would not only be proper, but incumbent upon the court, to examine the grand jury minutes, so as to protect the citizen from oppression, I think the policy of the law

is unalterably opposed to fishing expeditions into grand jury minutes, conducted by the court at the request of defendants on affidavits upon information and belief, and there is no reason shown in this case why such an expedition should be entered on."

The following quotation from *United States* v. *Cobban*, 127 Fed. 713, is very pertinent to the question before the [fol. 36] Court. Pleas in abatement were interposed in this case on the ground, among others, that the testimony was insufficient: "Clearly, this involves an investigation of the testimony produced before the jury, and a determination of its relevancy and sufficiency. If it be admitted that any of the testimony can be reproduced, then it all must be, if the defendant demands it, for there is no possible place in principle to draw the line between that which shall and that which shall not be received. We thus have the spectacle of the court sitting as one of error and review upon the case as heard before the grand jury, and this upon the sole demand of the defendant. I confess this is contrary to all my conceptions of the practice, and, if established, must lead to a miscarriage of justice. All that secrecy of investigation which for ages has been associated with the grand jury system, and which has been deemed an efficient means of its successful operation, is swept away, and all its proceedings must be made, if the defendant so wills, as public as those of a town meeting. A more serious objection is that a defendant may thus learn what testimony exists against him, and be prepared to overcome it upon the trial by perjury. It is idle to moralize that we cannot presume that perjury will be invoked in behalf of the guilty, for we know that it often is. To establish this rule of inquiry, and carry it to its legitimate conclusion, would, in my opinion, result in a shield to crime, for which, it must be admitted, there are already many avenues of escape. • • •

"In U. S. v. Reed, 2 Blatchf. 435, 27 Fed. Cas. 727, was a motion to quash the indictment for, among other reasons, the insufficiency of the evidence. Says Mr. Justice Nelson: 'No case has been cited, nor have we been able to find any, furnishing an authority for looking into and revising the judgment of the grand jury upon the evidence for the purpose of determining whether or not the finding was founded upon sufficient proof'; and, further, that it was contrary to the policy of the law to try the question whether the grand jury had sufficient or any evidence to warrant their finding.

This case is important because by a justice of the Supreme Court, and its ruling is clear and explicit. To the same [fol. 37] effect is U. S. v. Brown, 1 Sawy. 533, Fed. Cas. No. 14,671, and U. S. v. Terry (D. C.) 29 Fed. 355."

The weight of authority is opposed to inquiry into proceedings before a grand jury when such proceedings on their face are regular, and the question of the sufficiency or insufficiency, competency or incompetency of the testimony adduced before the grand jury is a matter which the Court has no right to inquire into. The reasons for the rule are sound, and to hold otherwise would lead to endless confusion.

However, assuming that I could grant the prayer of the plea, there would be no justification for it in this case. No allegation of fraud or irregularity is made; no proof of the allegations of the plea is tendered in any form by affidavit or otherwise, except the sworn verification of the president of the defendant company, and this is not sufficient. He states the things alleged upon information and belief. The source of his information is not stated, nor the reason for his belief. Testimony before the grand jury was not reported, and there is no way by which the defendant can possibly know what evidence was or was not produced at the inquiry. The plea in abatement cannot be sustained.

The defendant Direct Sales Company demurs to the indictment on the following grounds: First, that the said indictment does not state facts sufficient to constitute a crime against the United States by the defendant, Direct Sales Company; second, that the indictment insofar as the defendant Direct Sales Company is concerned is in conflict with the fifth and sixth amendments to the Constitution of the United States being too indefinite and a delegation by Congress of legislative powers to Court and juries to determine what acts are criminal. The indictment charges a crime against the United States in the following language: "* * * did unlawfully, wilfully, and knowingly combine, conspire, confederate, and agree together that they would defraud the United States out of its revenue as provided by the terms of said Act, as amended, and that they would commit offenses against the United States of America by [fol. 38] violating the provisions of Sections 1 and 2 thereof; that is to say, they would obtain large quantities of morphine sulphate by use of official order forms prescribed by

the said Act, for purposes other than in the conduct of a lawful business in said drugs, or in the legitimate practice of medicine, and that they would sell, barter, exchange and give away said drugs, so obtained, without having registered in a classification under said Act permitting them so to do, and without having paid the special tax required, and that they would sell, barter, exchange and give away said drugs not in or from the original tax stamped packages, and not in pursuance of written order forms from the persons to whom sold, bartered, exchanged and given, and said unlawful purposes were to be accomplished in the following manner, to wit: * * * "The things which the indictment alleges the defendant agreed to do are unlawful. The basis of conspiracy is the agreement, and cases cited by the defendant are pertinent to this point but the rule is better stated in *Asgill* v. *United States*, 60 F. (2d) 780 (C. C. A. 4), where the Court said: "The basis of a conspiracy is the unity of design and purpose; it is what has been agreed to and not what has been done, and so it has been held that several persons may, simultaneously actually do, without incurring liability to punishment, that which if it were the object of a preconcerted design, would render the participants liable to indictment for conspiracy; nor will the evidence that each of several defendants acted illegally or maliciously with the same end in view support a charge of conspiracy, unless it appears that such acts were done pursuant to a mutual agreement."

This indictment is in the language of the conspiracy statute. It alleges an agreement to do certain things prohibited by the Harrison Narcotic Act, and it further sets forth the manner in which the Act was intended to be violated. It meets the requirements of the rule as given in *Hill* v. *United States* (C. C. A. 4), 42 F. (2d) 812: "When it charges in the words of the conspiracy statute a conspiracy to violate a criminal statute of the United States and [fol. 39] contains a sufficient description of the object of the conspiracy to fairly and reasonably inform the accused of the character of the offense charged it is sufficient."

And in *Martin* v. *United States* (C. C. A. 4), 299 Fed. 287, the Court said: "The sufficiency of a criminal pleading should be determined by practical as distinguished from purely technical considerations. Does it under all of the circumstances of the case tell the defendant all that he needs to know for his defense, and does it so specify that

with which he is charged that he will be in no danger of being a second time put in jeopardy? If so, it should be held to be good."

Under the terms of the Harrison Narcotic Act it is unlawful, among other things, (1) to sell, dispense or distribute the prohibited drugs except in or from the original stamped package; (2) for a physician to sell, distribute or dispense not in the course of his professional practice or for legitimate medical purposes; (3) to sell, barter, exchange or give away any of said drugs except in pursuance of a written order to the person to whom sold, etc., on a form issued in blank for that purpose by the Commissioner of Internal Revenue; (4) to the sale, dispensing or distribution of said drugs by a dealer to a consumer, not in pursuance of a written prescription issued by a physician registered under the Act; (5) for any person to obtain by means of order forms any of said drugs for any purpose other than the use, sale and distribution by him in the conduct of a lawful business in said drugs or the legitimate practice of medicine. All of these provisions are alleged to have been violated, or intended to be violated, by some one or more of the defendants, pursuant to agreement between all of them.

The indictment specifically alleges that the defendant, Dr. John Victor Tate, obtained said drugs from the defendant, Direct Sales Company, by use of his official order forms, for a purpose other than the use, sale and distribution by him in the conduct of a lawful business or in the legitimate practice of his profession, and that the defendant, Direct Sales Company, induced him to do so and made such sales knowing the purpose for which they were [fol. 40] being obtained. Defendant contends that an allegation that the defendant, Direct Sales Company, sold the drugs "knowing" the purpose for which they were purchased is not enough to save the indictment, and cites *United States* v. *Kerper*, 29 F. (2d) 744, and *United States* v. *Russell*, 41 F. (2d) 852. These cases reiterate a well established principle of law, that is, that mere knowledge of one that another contemplates violation of the law would not make them co-conspirators. Something more is necessary, and that is the agreement and unity of design and these elements the indictment alleges. In my view of the expression "then and there well knowing", etc., in the indictment adds nothing to its sufficiency and may be re-

garded as surplusage. If there was an agreement, then the defendants had knowledge of the facts. If there was no agreement, then there was no conspiracy. The indictment alleges an agreement and an active participation by Direct Sales Company pursuant to it. This is the sort of knowledge and participation which the Court condemned in the case of *Wilson* v. *United States*, 59 F. (2d) 97, "where a defendant has knowledge that another is promoting a violation of the prohibition law, and in need of materials for furthering the enterprise, and such defendant, with such knowledge furnishes the necessary materials for the purpose of forwarding the unlawful purpose, making it possible to accomplish the unlawful act, he is guilty." See also *Pattis* v. *United States*, 17 F. (2d) 562 (C. C. A. 9).

In *Doremus* v. *United States* (C. C. A. 5), 262 Fed. 849, it was held that a physician issuing a prescription which he knew was not in good faith, aided and abetted an unlawful sale by a druggist who knew the facts. To the same effect is *Webb* v. *United States*, 249 U. S. 96; *Terry* v. *United States*, 61 F. (2d) 49 (C. C. A. 4); *Costal* v. *United States* (C. C. A. 6), 13 F. (2d) 843.

Whether or not the testimony at a trial will support the allegations that there was an agreement between the parties and active cooperation between them, remains to be seen, but such allegations are sufficient to sustain the indictment.

The first ground of the demurrer therefore cannot be sustained.

[fol. 41] Defendant contends that as to it the indictment is in conflict with the Fifth and Sixth Amendments to the Constitution of the United States, and in its brief states its reasons as follows: " * * * defendant states that its claim as to a violation of the Fifth and Sixth Amendments is based on the proposition that Congress did not deem it necessary to place a limitation or ceiling upon the amount of opium, or its derivatives that may be dispensed by a duly licensed wholesaler or dealer to a duly licensed physician pursuant to an order form issued by the Collector of Internal Revenue. That under this indictment, the defendant is not adequately informed of the nature and cause of accusation against it because it is left to the discretion of the Court and jury to determine what amount may be dispensed by the licensees. That such a construction would

result in a delegation by Congress to Courts and juries of its powers to define crime and it is therefore repugnant to the Constitution and its Fifth and Sixth Amendments."

There is no doubt but that the power to define crime rests solely with the Congress, and that such power cannot be delegated. The Harrison Narcotic Act, however, specifically makes the doing of many acts, some of which have already been enumerated herein, unlawful and the Supreme Court of the United States has held the Act to be constitutional as a revenue measure. *Jin Fuey Moy* v. *United States*, 254 U. S. 189; *United States* v. *Doremus*, supra. It is true that Congress has placed no limit on the amount of drugs which a physician may prescribe or which a retail or wholesale licensee may sell. It may be conceded that such an attempt would meet with constitutional difficulties. It is unlawful, however, for any person, a physician included, to obtain the drugs by use of official order forms for any purpose other than a legitimate one, and the amount obtained, whether great or small, makes no difference. A retail dealer in narcotic drugs may sell to a consumer on the prescription of a physician. It is so provided by the Act. Yet the Courts have held time and again that a physician's prescription, when not issued in good faith "is not a prescription", and will protect neither the physician who issued it nor the retail licensee who knowingly accepts and [fols. 42-45] fills it. *Webb* v. *United States*, supra. An order form has no greater validity or dignity under the Act than a prescription. If the latter when not issued in good faith for a lawful purpose will not protect the physician or the retailer, why should an order form issued to obtain the drugs for other than a lawful purpose protect the physician issuing it or the wholesaler who sells pursuant to it, knowing the facts. On principle there would seem to be no sound reason under the same circumstances to hold the one void and of no protection to the parties to it and to hold the other valid and of absolute protection.

No attempt is made to have the Court determine how much of the drugs may be sold to a licensee. It is simply alleged that this defendant, along with other defendants, agreed to do certain unlawful things and that certain of them committed overt acts in pursuance thereof. The indictment need not set forth all of the evidence by which the government proposes to prove the agreement, but I have

no right to assume that such evidence does not exist. The defendant is held to answer on the presentment of a grand jury as provided by the Fifth Amendment of the Constitution and is sufficiently informed of the nature and cause of the accusation as provided by the Sixth Amendment. The second ground of the demurrer cannot be sustained.

For the foregoing reasons the Plea in Abatement and the Demurrer should be overruled.

(Signed) C. C. Wyche, United States District Judge.

Spartanburg, S. C., September 19, 1941.

[File endorsement omitted.]

[fol. 46] In the District Court of the United States

[Title omitted]

Transcript of Testimony and Proceedings on Trial

The above-entitled case came on to be heard before the Honorable C. C. Wyche, United States District Judge, presiding, and a Jury, at Greenwood, South Carolina, on November, 10, 11, 12 and 13, 1941.

Appearances:

For the United States: O. H. Doyle, Esq., United States Attorney, Anderson, S. C.

For the defendant, Direct Sales Company, Inc.: William B. Mahoney, Esq., Buffalo, New York.

For the defendant, Dr. John Victor Tate: J. M. Nickles, Esq., Abbeville, S. C.

For the defendant, Clyde A. Foster, W. A. Tinsley, Esq., Greenwood, S. C.

Court convenes at 10:00 o'clock, a. m., November 10, 1941.

Pleas

The defendant, Direct Sales Company, Inc., by its President, Mr. George J. Dotterweich, Jr., pleads not guilty.

The defendant, Dr. John Victor Tate, pleads not guilty.

The defendant, George C. Johnson, pleads guilty and [fol. 47] waives appointment of attorney.

The defendant, Reel B. Black, pleads guilty and waives appointment of attorney.

Clyde A. Foster, defendant: I would like to have somebody tell me what I am here for. I may want to plead guilty myself.

The Court: I can tell you what you are charged with. This indictment charges that you and the Direct Sales Company, Dr. John Victor Tate, George C. Johnson and Reel B. Black entered into a conspiracy to violate the Harrison Narcotic Act; that is, that you had an agreement and understanding to violate certain sections of the Harrison Narcotic Act regarding the sale and disposition of morphine.

Clyde A. Foster: I know Mr. Black and Mr. Johnson, but the Doctor I have never seen in my life.

The Court: Dr. Tate?

Clyde A. Foster: I don't know him.

The Court: Let him plead not guilty and I will appoint him an attorney.

The defendant, Clyde A. Foster, pleads not guilty.

The Court: Are there any preliminary motions?

Mr. Mahoney: Your Honor, we respectfully call your Honor's attention to the indictment itself as to the plea of the defendant, Direct Sales Company, Inc. The second paragraph of the second page of the indictment—Have you a copy of it, your Honor?

The Court: The second paragraph starting on page 2?

Mr. Mahoney: Page 1. The second paragraph alleges that the Direct Sales Company is a corporation, etc. In [fol. 48] connection with the plea on behalf of the corporation in this case, the Direct Sales Company is admitting the truth of the allegations contained in that second paragraph. As to the following paragraph, which is the third paragraph on the first page, we are admitting on information and belief the allegations contained in the third paragraph on page one. As to the first paragraph on page two, we are denying that we have any knowledge or information as to the allegations concerning the defendants Johnson, Foster and Black. As to the alleged conspiracy, the plea is not guilty. For the purpose of the record, Your Honor, I am

renewing at this time the motion made before yourself, I think on the 14th. of August, 1941, both as to the demurrer and as to the plea, and we move at this time on the same grounds stated at that time.

The Court: The same ruling.

Mr. Mahoney: Exceptions, your Honor, to the ruling.

The Court: Exceptions taken and allowed.

Mr. Nickles: I think it fair to state that Dr. Tate pleaded guilty to violation of the Narcotic Act before the Court at Greenville, and while he pleaded guilty he is here as a witness for the Government.

Mr. Mahoney: I appreciate that information, but I wonder if counsel will tell me what he pleaded guilty to.

The Court: I think counsel is entitled to a copy of the indictment here. Give him the original indictment as to what he did plead guilty to.

Mr. Mahoney: Thank you.

The Court: Let the record show that Mr. Mahoney is admitted to practice in this District for the purpose of this trial.

[fol. 49] The Court: Mr. Tinsley, would you represent one of the defendants, Mr. Foster, if appointed by the Court?

Mr. Tinsley: Yes, sir, your Honor.

Court recesses to permit Mr. Tinsley to consult with the defendant, Clyde A. Foster.

The Court: Are there any questions you gentlemen wish propounded to the jurors?

Mr. Mahoney states to the Court the procedure followed in the first, second and sixth circuits with reference to the preliminary examination made of jurors by counsel relative to their qualifications, and the Court grants him permission to make such examination of jurors in this case.

Mr. Doyle requests the Court to question the jurors as to relationship with the local defendants.

Mr. Tinsley announces that he is ready to proceed.

The Court questions the jurors collectively as to their qualifications, and, Mr. Mahoney examines each juror called as to his qualifications, after which a jury is duly chosen, impaneled and sworn.

Mr. Doyle publishes indictment to the jury.

Mr. Mahoney: If your Honor please, at this particular time I wish to object to any opening.

The Court: Mr. Mahoney, it is not the practice in this District for the District Attorney to make any opening. He is just publishing the indictment.

Mr. Mahoney: At this particular time, your Honor, I am objecting to the reading of the balance of this particular indictment on the ground that it is setting forth before the jury a content that sets forth overt acts, etc. pursuant to [fol. 50] an alleged agreement, which is not binding on the Direct Sales Company, Inc.

The Court: The objection is overruled for this reason. It is the practice in this jurisdiction that the District Attorney publish, which means reads, the indictment to the jury, so that the jury will know what the defendants are charged with before the testimony is presented. It is also the custom in this jurisdiction that the indictment be handed to the jury at the conclusion of the Judge's charge and that they take it in the jury room with them. For that reason the objection is overruled.

Mr. Mahoney: We respectfully except.

The Court: Exception noted. Proceed.

Mr. Doyle continues the publishing of the indictment.

Mr. Mahoney: If your Honor please, before the reception of any evidence, I would ask your Honor to instruct the jury that the reading of the indictment at this time is no evidence of the guilt of any of the defendants wha-soever.

The Court: That is true, Gentlemen.

* * * * * * *

Dr. Coyt Ham, a witness produced on behalf of the United States, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Doyle:

Q. Dr. Ham, you are a physician?

A. I am.

Q. Where did take your training as a physician?

A. South Carolina Medical College at Charleston.

Q. When did you finish?

A. June, 1919.

[fol. 51] Q. Did you then go into practice?

A. I did.

Q. Whereabouts?

A. I went into practice at Olanto, South Carolina.

Q. Where did you then go?

A. Columbia.

Q. Where were you connected there?

A. South Carolina State Hospital.

Q. Have you been connected with the South Carolina State Hospital since then?

A. Continuously since 1921.

Q. Do you know any of the defendants in this case?

A. I do not.

Q. Doctor, I want you to tell the jury what hypodermic tablets of morphine sulphate are.

Mr. Mahoney: I object to this, Your Honor, on the ground that it is incompetent, irrelevant and immaterial.

The Court: Objection overruled.

Mr. Mahoney: Exception, please.

The Court: Exception noted

A. Morphine sulphate is a derivative of opium.

Mr. Doyle:

Q. When put up in tablet form, what is it put up in?

A. Eighths, quarters and halves are the only ones I have seen.

Q. It is sometimes put up in one grains?

A. I have never seen one.

Q. Now, Doctor, tell the jury in what cases the use of morphine by physicians is indicated.

A. Morphine sulphate is a sedative and is usually used to relieve pain.

[fol. 52] Q. Doctor, is it not used in any cases except cases of severe pain?

A. You say severe pain?

Q. Yes.

A. It might be used in mild pain.

Q. In that case what amount would you use?

A. That would depend entirely on the case.

Q. Tell the jury, Doctor, what the usual dose of morphine is when you administer it to a patient.

Mr. Mahoney: Your Honor, this is objected to on the ground that no background or basis has been laid whatsoever in this particular.

The Court: My ruling is this. Conspiracy cases are generally made secretly or furtively. They don't enter into a written agreement and the only way you can prove a conspiracy case as a general rule is by circumstantial evidence. The District Attorney cannot prove all the circumstances by one witness, and he has to prove a circumstance here and a circumstance there in order to prove the agreement.

Mr. Mahoney argues on objection.

The Court: Objection overruled.

Mr. Mahoney: Exception, please.

The Court: Exception taken and allowed.

Mr. Doyle:

Q. Dr. Ham, I will ask you to tell the jury what the usual and proper dosage of morphine is when it is used at all.

Mr. Mahoney: Your Honor, may I note an objection now?

The Court: He is objecting to all the testimony of this witness.

[fol. 53] A. A dose would vary depending on the condition for which it was used.

Mr. Doyle:

Q. What is the maximum dose usually given?

A. The maximum dose? Personally I have given as much as one-half grain in a few rare cases.

Q. Under what circumstances would you administer as much as one-half grain?

A. Where an individual was suffering very intense pain such as encountered in renal colic or kidney colic.

Q. In such cases as that, what size doses are usually given or administered by a physician in the course of everyday practice to such persons?

A. Personally an eighth to a quarter grain.

Q. Is morphine sulphate a poison as well as a sedative?

Mr. Mahoney: I object to that as incompetent and irrelevant.

The Court: What is the relevancy of that?

Mr. Doyle: I am leading to the effect.

The Court: What difference does it make whether it is a poison or not so far as this defendant is concerned. Objection sustained.

Mr. Doyle:

Q. Dr. Ham, how many normal doses would be in 500 grains of morphine?

Mr. Mahoney: I object to that, your Honor, as incompetent, irrelevant and immaterial.

The Court: Objection overruled.

Mr. Mahoney: Exception, please.

The Court: Exception taken and allowed.

[fol. 54] Mr. Doyle:

Q. How many normal doses would be in 500 grains of morphine?

A. That would depend entirely on the condition for which it was given and what you might have reference to when you say a normal dose of morphine.

Q. Just say an average dose.

A. The average dose, as I stated a moment ago, would be about a quarter of a grain.

Q. Now, Doctor, when a physician administers morphine at all, state whether or not it is the practice of the profession to make an examination of the person to determine whether or not its use is indicated, and how much.

A. Always.

Mr. Mahoney: I object to that, your Honor. That is absolutely irrelevant.

The Court: Well, I cannot tell whether it is or not. As I said, my ruling is that you cannot prove it all out of the mouth of one witness. I don't know whether it is relevant or not. I will admit it for the time being. If it becomes irrelevant, I will strike it out. It may be relevant and may not. I don't know.

Mr. Doyle: I am offering now an expert witness so the jury will understand the balance of the testimony better. You may examine him.

Mr. Mahoney: No questions.

Witness leaves stand.

[fol. 55] J. S. LANIGAN, a witness produced on behalf of the United States, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Doyle:

Q. Mr. Lanigan, are you a Narcotic Agent?
A. Yes, sir.
Q. You have been for several years?
A. Yes, sir.
Q. Mr. Lanigan, in 1939 were you assigned to an investigation of Dr. Tate?
A. Yes, sir.
Q. On June 16th, 1939, did you go down to Calhoun Falls to see him?
A. Yes, sir.
Q. Who was with you?
A. Informer George Johnson.
Q. That was the man you were using as an informer?
A. Yes, sir.
Q. What were you attempting to do?

Mr. Mahoney: I object to that, your Honor. It is incompetent so far as the Direct Sales Company is concerned.

The Court: I will admit it for the time being. I don't know whether it is competent or not.

Mr. Doyle:

Q. What did you do with George Johnson when you got there?

A. I searched George Johnson to see that he had no narcotics on his person, and I furnished him the money to make a purchase of narcotics from Dr. Tate. We drove up in the vicinity of Dr. Tate's office and George Johnson went in Dr. Tate's office. He stayed in there about fifteen min-[fol. 56] utes and came out and turned over to me a small brown bottle bearing the Direct Sales Company label, of New York, on it, containing 100 half grain morphine tablets.

Q. Did he have anything on him at all of that nature when he went in the office?

A. He had no narcotics on his person and had no money. I furnished money which the United States Government puts aside to make purchases of illegal transactions.

Q. Do you know whether that bottle had a catalogue number on it?

A. It had a catalogue number at that time, but I do not recall that because that evidence was turned over to Mr. Holman, United States Chemist, Atlanta, Georgia. If I had it, I could identify it as the evidence I had at that time.

Q. Subsequently were you called off the case and assigned somewhere else?

A. Yes, sir.

Q. That was your last connection with it?

A. The last transaction with Dr. Tate.

Mr. Doyle: You may examine him.

Cross-examination.

By Mr. Mahoney:

Q. Just when was it that you were assigned to this particular investigation of Dr. Tate?

A. My investigation started in this District in January of that year.

Q. What year?

A. 1939.

Q. And you and Mr. Johnson went down to Dr. Tate's office when?

[fol. 57] A. June 16th.

Q. And that was in 1939?

A. Yes, sir.

Q. Now, prior to June 16th, 1939, did you know that part of the business of the Direct Sales Company was manufacturing and compounding opium derivatives?

A. Yes, sir. I was assigned to this district three or four years prior to this date and at that time I made an investigation of Dr. Tate's records; and at that time I checked Dr. Tate's records and order forms, about four or five years prior to this time, and they showed that he had purchased some narcotics from the Direct Sales Company. I am not positive, but I believe that is correct. That is from memory.

Q. That is your best recollection?

A. Yes, sir.

Q. You are not sure of it, but you think that in a check you made prior to that time, you think you found some order forms of Dr. Tate's from the Direct Sales Company?

A. I might be mistaken, but I think that is what happened.

Q. Then you know that the Direct Sales Company was a licensed manufacturer and licensed wholesaler?

A. I had known that.

Q. And you know that they had registered pursuant to the Harrison Narcotic Act with the Treasury Department?

A. Yes, sir.

Q. You knew a license had been issued by the Treasury Department to the Direct Sales Company to manufacture and deal wholesale with morphine derivatives?

A. Yes, sir.

[fol. 58] Q. And, at the time the bottle was turned over to you by Mr. Johnson and you saw the label of the Direct Sales Company, you knew they were licensed manufacturers and wholesalers?

A. Yes, sir.

Q. And that is your only connection with the case?

A. Yes, sir.

Q. You *never* conserved at that time with any of the officers of the Direct Sales Company?

A. No, sir.

Q. And you don't know who the officers were?

A. No, sir.

Q. You never in your examinations down here contacted any of their agents?

A. No, sir.

Q. So the only contact you had was an examination of order forms you saw in Dr. Tate's office, which to the best of your recollection were to the Direct Sales Company, Inc., and the fact that you received that bottle from Johnson on that day?

A. When I made an inspection of the records of Dr. Tate from the Direct Sales Company, if my recollection is correct the Direct Sales Company was selling to Dr. Tate morphine in very heavy amounts, and I made a report to my superior that Dr. Tate was buying heavily from the Direct Sales Company.

Q. You made a report to your superior in Atlanta?

A. I believe then the office headquarters was in Baltimore, Maryland.

Q. Wherever the headquarters were, you made such a report to your superior?

A. Yes, sir, just a letter.

[fol. 59] Q. You say this investigation was on June 16th, 1939. You say it was four or five years before that, so it would be about 1935?

A. Somewhere around there.

Q. As a result of your report were you ever called back on the Direct Sales matter?

A. No, sir. I have worked all over the country since then.

Redirect examination.

By Mr. Doyle:

Q. You have no knowledge of your own as to who took up the investigation?

A. No, sir, I do not.

Witness leaves stand.

Albert P. Rogers, a witness produced on behalf of the United States, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Doyle:

Q. Mr. Rogers, you are a Narcotic Agent?

A. I am.

Q. What office do you work out from?

A. The Atlanta office.

Q. The District Office?

A. District Supervisor, Atlanta, Georgia.

Q. How long have you been a Narcotic Agent?

A. Since April 16th, 1933.

Q. Mr. Lanigan testified as to the partial investigation from which he was called off. Were you assigned to this particular investigation?

[fol. 60] A. I was.

Q. Will you tell the Court and jury what your investigation was?

Mr. Mahoney: This is objected to on the ground that it is incompetent, irrelevant and immaterial as to the Direct Sales Company.

The Court: I will let it in for the time being. If it is not relevant as to the defendant, Direct Sales Company, I will strike it out later.

Mr. Doyle:

Q. When did you go there?

A. The first date was September 6th. I accompanied Mrs. Ruby Lamar.

Q. Who is Ruby Lamar?

Mr. Mahoney: I object to it on the ground that it is incompetent, irrelevant and immaterial. No connection whatsoever has been shown between the Direct Sales Company and Ruby Lamar, and no agreement has been proven here.

The Court: I overrule the objection temporarily and I will see if it has any bearing on this defendant.

A. Ruby Lamar was employed as an informer and was employed under my direction in making this investigation from about September 1st to about the 1st of December, 1939.

Mr. Doyle:

Q. And you took her with you to Calhoun Falls?

A. To Calhoun Falls.

Q. In an effort to find out what?

A. In an effort to find out if morphine was being sold, and if so, offering them an opportunity to sell morphine, as we had information——

[fol. 61] Mr. Mahoney: We object.

The Court: Objection sustained.

Mr. Mahoney: We ask that it be stricken out and the jury instructed to disregard it.

The Court: Strike it out, and Gentlemen of the Jury, don't consider any conversation he had with anybody, any hearsay testimony.

Mr. Doyle:

Q. When did you go there?

A. September 6th, 1939.

Q. You made notes of what you did at that time?

A. Yes, sir.

Q. If you wish to refresh your memory from them, you may do so. What did you do on that occasion?

A. I gave Miss Lamar some money. I got out of the car before we got in sight of the office. She went in the office and after some time returned with 18 quarter grain *porphine* tablets.

Q. All right, was it turned over to you?

A. It was turned over to me and I marked it for identification and turned it over to Mr. Weatherwax. Then on the 8th. we went back again.

Mr. Mahoney: This is objected to, your Honor. May it be considered that my objection is for each of these particular dates?

The Court: Of course, technically speaking you may be correct, Mr. Mahoney, but the District Attorney has to take up the allegations of his indictment one at a time and he cannot put them all up at once. It has to be done with a circumstance here and a circumstance there. This testi- [fol. 62] mony I am now admitting tentatively. If your client is not connected with it, I will strike it out and tell the jury not to consider it.

Mr. Mahoney: Just so my objection and exception will apply.

The Court: I am not ruling on it. I am reserving my decision as to this testimony because your client has not been connected with it. If you insist that this witness be put back on the stand if and when your client is connected with it, of course I will have to do it, but I hope you won't do that. This testimony is not competent as to your client yet, and I will so instruct the jury. Is that what you want?

Mr. Mahoney: Yes, sir.

The Court: That is what I meant to say, that I was admitting it tentatively. Is that satisfactory?

Mr. Mahoney: Yes, sir, your Honor, if you will instruct the jury that it is not competent as to my client yet.

The Court: That is what I meant, so we would not have to put this witness back on the stand. I will instruct you, Gentlemen of the Jury, that this testimony given by this witness is not competent as to the Direct Sales Company yet because they are not connected with it; and don't con-

sider it as to the Direct Sales Company until it is connected with it, and if it is not connected with it I will strike it out.

Mr. Doyle:

Q. I believe you were on September 8th.

[fol. 63] A. On September 8th we went back again. I gave her some money and she went in Dr. Tate's office and came out with 75 half grain morphine tablets, which I turned over to Mr. Weatherwax.

Q. The next date.

A. On September 13th, 16th and 18th. On September 13th, 75 halves; September 16th, 12 quarters, I believe, or 24 quarters; and September 18th, 13 halves.

Q. On September 30th were you back there?

A. Back on September 30th with 100 halves.

Q. Did you see Dr. Tate on any of those occasions?

A. I saw Dr. Tate on September 8th. I went in and told Dr. Tate that I was a show man, making my living on carnivals. I said I would be there about a year, and that my name was R. J. Shaw, Westminster, South Carolina. Dr. Tate said he was about out, but he gave me 8 half grain morphine tablets at that time.

Q. Was any examination of you made?

A. No, sir, no examination was made.

Q. Now, take up your story by dates.

A. I went back on the 28th, and Dr. Tate said he was entirely out, but he ordered once a week and he would put me on his order. He said his orders were rather heavy because he had some patients that used a considerable amount of stuff. Well, it was agreed then that if I would come back on Saturday week—this was on Thursday, that he would have maybe a hundred or more tablets.

Q. Did you go back?

A. Yes, sir, I went back about the 5th, I believe, of Oc-[fol. 64] tober, and at that time Dr. Tate said he had 150 tablets for me, which was $6.75, and I paid him $6.75. Then the following Saturday, the 14th, I went back, and each time I would just go in and as soon as my turn came as a patient I would go in and see the Doctor and get 200 half grain tablets and pay him $9.00.

Q. On each occasion, what did you do with it?

A. On each occasion, I turned it over to Mr. Weatherwax, Augusta, Georgia, on the same day. Now, this continued

each week, the 7th, 14th, 21st, 28th, October 11th and October 18th. On each occasion, I purchased 200 tablets. On the 21st. of October—The Tablets ordinarily were in any kind of little container, or small box, or medicone. On October 21st, they were in a 500 bottle, but there were only 200 in the bottle. The label was partially scratched off, but it had some fragments of the label, which I turned over to Mr. Weatherwax intact.

Q. Do you remember what the label had on it?

A. It had "500" or something on it. Now, on the dates beginning September 23rd, on each date that I went I also got out of the car upon arrival and Mrs. Lamar would go in or I would go in, and she bought on each date that I bought beginning September 23rd up to November 8th, 100 each week. She would go into Dr. Tate's office and come out.

Q. When you finished that you closed the investigation?

A. Closed the investigation and turned it over to Mr. Weatherwax.

Q. You satisfied yourself and made your report?

A. Yes, sir.

Q. Did you make any notation of that botttle you got on October 21st?

[fol. 65] A. Yes, sir, I think I did. It doesn't appear that I made a memorandum on the exact number of those fragments, but I turned the bottle over to Mr. Weatherwax in the condition I received it and I turned my report over to him.

Q. Now, on any of the occasions that you were there, were you ever examined?

A. There were no examinations made at all.

Q. Did you receive any instructions for taking morphine?

A. No, sir, no instructions at all.

The Court: In connection with the testimony of this witness, the testimony does not so far connect the Direct Sales Company and must not be considered, Gentlemen, against that defendant unless it is later connected up.

Cross-examination.

By Mr. Mahoney:

Q. Mr. Robers, is Miss Lamar a user of opiates?

A. She was not at that time according to my information.

Q. You said your first date was September 6th, 1939. Is that correct?

A. That is the first date we went over there.

Q. Where had you met Miss Lamar prior to that time?

A. I met her in Augusta, Georgia.

Q. In connection with your investigation of opiates?

A. No, sir, I was introduced to her by the District Supervisor.

Q. The District Supervisor of Narcotics?

A. Yes, sir.

Q. Do you know what his connection with her might have been at that time?

A. She was to work as an informer and assist me in mak- [fol. 66] ing investigations where she knew persons who had violated the law.

The Court: He asked you if you knew what his connection with her might have been at the time you met her.

A. She was employed as an informer.

Mr. Mahoney:

Q. In other words, you were introduced to her as an informer, were you?

A. Yes, sir.

Q. In the employ of the Supervisor of Narcotics?

A. Yes, sir.

Q. You say at that time she was not a user?

A. According to my information she was not a user.

Q. Do you know whether since that time she has become a user?

A. I know according to my information that she had been prior to that time, but at that time was not.

Q. Prior to that time she had been a user?

A. Yes, sir.

Q. In other words, she had taken a cure?

A. Yes, sir.

Q. Do you know whether she has become a user since that time?

A. I don't know. I have not contacted her for several months.

Q. You have conversed with her?

A. Yes, sir, but I never asked if she was using junk.

Q. You conversed with her this morning in the hall?

A. Yes, sir.

Q. And went over your notes with her?

A. Yes, sir.

Q. You went over the notes you took at that time?

A. Refreshing our memories, yes, sir.

[fol. 67] Q. In connection with the visits that you made to Dr. Tate's office. Is that at Calhoun Falls?

A. Yes, sir.

Q. Who did you pay the money to?

A. Dr. Tate.

Q. You were not present when Ruby Lamar made her purchases?

A. No, sir.

Q. Did she inform you as to whom she paid when she went in there?

A. She paid Dr. Tate, according to her statement to me. On a great many instances she paid Dr. Tate.

Q. She never told you she paid anyone else in Dr. Tate's office for these morphine sulphate tablets?

A. I think on one or two occasions he was busy and she paid the nurse.

Q. Is that a nurse employed by Dr. Tate?

A. That was the nurse at the office. I am not positive, but I believe on one occasion she told me that Dr. Tate was busy and the nurse waited on her.

Q. On once occasion, of which you have some sort of recollection, she told you that she paid Dr. Tate, and on one occasion she told you that she paid the nurse?

A. That's my recollection.

Q. On the occasions you were there, you paid Dr. Tate personally?

A. Yes, sir.

Witness leaves stand.

[fol. 68] Mrs. Ruby Lamar, a witness produced on behalf of the United States, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Doyle:

The Court: I take it, Mr. Doyle, that you intend this testimony to relate to Dr. Tate only?

Mr. Doyle: Except on one occasion I expect to refer to the Direct Sales Company.

The Court: Gentlemen of the Jury, don't consider this testimony until it refers to the Direct Sales Company. It is not competent as to the defendant, Direct Sales Company, until it refers to the Direct Sales Company.

Mr. Doyle:

Q. Mrs. Lamar, where did you live in 1938?

A. In 1938, in North Carolina.

Q. Did you once live in Greenville, South Carolina?

A. Yes, sir.

Q. Were you, when you lived in Greenville, addicted to the use of narcotics?

A. At one time, yes, sir.

Q. Did you go somewhere for treatment?

A. Yes, sir.

Q. Where?

A. The Rowan Hospital, at Salisbury, North Carolina.

Q. When you returned back from that treatment, did you get employment with the Narcotic Office, with Mr. Weatherwax?

A. No, sir, I didn't.

Q. Did you with anyone else?

A. I worked out of Baltimore before I worked out of the Atlanta office.

[fol. 69] Q. Had you been cured at that time?

A. Yes, sir.

Q. Did you go with Mr. Rogers to Calhoun Falls in an effort to find out what was going on in Dr. Tate's office?

A. Yes, sir.

Q. Did you make a memorandum of what you did?

A. Yes, sir.

Q. Have you that with you?

A. I have it back there (indicating).

Q. If you wish to refer to it, as to dates, you may do so. Just to make the testimony short, as to the purchases made by you while Mr. Rogers and you were together, you heard him testify to those purchases, did you not?

A. Yes, sir.

Q. Did you or not make all those purchases he referred to?

A. Yes, sir.

Q. Did you keep any of the morphine purchased?

A. No, sir.

Q. Did you turn it over to him?

A. Yes, sir.

Q. When you went to see Dr. Tate, what did you tell him your name was?

A. Lois Perry.

Q. Did you complain of any ailment or sickness?

A. No, sir, I just said I wasn't feeling good. He wanted to know what was wrong with me, and I said that one doctor had said that I had T. B.

Q. Did he make any examination of you?

A. No, sir.

Q. Did you tell him you wanted any morphine?

[fol. 70] A. Yes, sir.

Q. What price did he charge you for it?

A. Well, he started charging, I think, $4.00 for a hundred, but he said the War was on and narcotics had gone up.

Q. Were you there at times when he didn't have any to sell you, and what did he say?

A. The first time I went he didn't have any, and he sent his office girl around to the drugstore and got 18-½ quarters, I think it was.

Q. That was a drugstore at Calhoun Falls?

A. Yes, sir, but he told me he had his order in and they would be in on Thursday, and for me to come back on Friday and he was sure it would be there?

Q. Did you go back on Friday?

A. Yes, sir.

Q. Had it come then?

A. Yes, sir, I think on that occasion it had.

Q. In what amounts did you buy from him?

A. I started with 75-½ half grain tablets.

Q. Did you go there regularly once a week?

A. Yes, sir, I would go twice most every week.

Q. Was any examination ever made of you?

A. No, sir.

Q. Do you recall any conversation that you had with him about getting the dope?

A. Well, you see I would have to wait sometimes to see him, and on one occasion when I was sitting talking to him——

Mr. Mahoney: I object to any conversation with him on the ground that it is incompetent, irrelevant and immaterial.

[fol. 71] The Court: It is competent against Dr. Tate, but not competent against the Direct Sales Company. You can consider it, Gentlemen, against Dr. Tate, but not against the Direct Sales Company.

Mr. Doyle:

Q. What did he say?

A. He said there was something wrong; that he had sent his order in and it had not come in, and he took an order form out of his desk made out to the Direct Sales Company.

Mr. Mahoney: We object on the ground that it is incompetent, irrelevant and immaterial.

The Court: Did you say you saw the order form?

Mr. Doyle: You can testify to what you saw.

A. Well, he took it out and said he couldn't understand why the order had not come in. He wanted to prove to me, I suppose, that he had the order.

Mr. Mahoney: I object to her supposition and move to strike it out.

The Court: Objection sustained.

Mr. Doyle:

Q. He showed you the duplicate order form that he keeps in the office?

A. Yes, sir.

Q. Do you know how the order forms are made out? The original——

Mr. Mahoney: I object to that on the ground that it is leading.

The Court: Objection sustained. It is leading.

Mr. Doyle: Well, it is a provision of law. It is in the books.

A. Well, he told me——

[fol. 72] Q. Not what he told you. Did you see the order form?

A. Yes, sir.

Q. Who was it made out to?

A. It was made out to the Direct Sales Company.

Q. Di you go back later and buy more?

A. I did.

Q. Now, there are several occasions here on which it is alleged in the indictment that you went there and bought from him. They are the ones Mr. Rogers testified to. Just give us the dates, because they are alleged as the overt acts in the indictment.

A. Well, I cannot recall all the dates I went, but I know it was the 18th, September 6th was the first, and I went regularly every week until I think sometime in December, and sometimes twice a week.

Q. September 30th?

A. Yes, sir.

Q. October 5th?

A. That's right.

Mr. Mahoney: I object to that, your Honor, counsel reading from a statement in front of him.

The Court: One minute. As I understand the agreement, if this testimony does become competent later, he will not require this witness to be put back on the stand.

Mr. Doyle: As against them, I do not intend to take the position that any of her testimony is competent against the Direct Sales Company, except where she says she saw the order form.

The Court: I admit it as against Dr. Tate.

[fol. 73] Mr. Doyle:

Q. Did you go back on any other occasions, except where you testified to, and he didn't have any and said when he would have it?

A. Yes, sir, I have been there on several occasions where he didn't have it, and the nurse would go to the postoffice and get it and bring the package back.

Q. Did you ever buy any of the morphine in bottles?

A. Yes, sir, white glass bottles, and then he has given it to me in pasteboard boxes, and in one case I had a bottle with the name of the Direct Sales Company on it. It was a large bottle.

The Court: I presume you mean that to be against the Direct Sales Company.

Mr. Mahoney: I object to it then. I have to wait, your Honor, until he comes to a particular piece of testimony be-

fore I can object. I object on the ground that it is incompetent, irrelevant and immaterial. It has no bearing on the Direct Sales Company at all.

The Court: Objection overruled.

Mr. Mahoney: Exception, please.

The Court: Exception taken and allowed.

Mr. Doyle:

Q. What did you ordinarily pay for this morphine?

A. Not over $8.00 a hundred. I think $8.00 was the most I paid; either eight or nine. I didn't start paying that at first.

Mr. Doyle: You may examine him.

[fol. 74] Cross-examination.

By Mr. Mhaoney:

Q. Just when did you acquire the habit, Mrs. Lamar, of indulging in morphine, opium and its derivatives?

A. What was the question again?

Q. Just when did you acquire the habit?

A. I don't recall the exact date. I think it was in 1936 or 1937.

Q. How did you come to acquire it?

A. I was sick at the time.

Q. Of what?

A. A nervous breakdown it was supposed to be.

Q. Well, supposed to be? Was that the diagnosis of your physician?

A. Well, the doctor said I had a nervous breakdown.

Q. Where were you then?

A. Salisbury.

Q. What hospital did you go to?

A. The Rowan Memorial Hospital.

Q. Your doctor was whom?

A. Dr. W. C. Slade.

Q. As a result of it, you acquired the habit?

A. Yes, sir, I just kept going back and getting it and I acquired the habit from that.

Q. You kept going back and getting it from whom? The doctor?

A. Yes, sir.

Q. And that was your attending physician?

A. Yes, sir.

Q. When did you take this cure?

A. I came out of the hospital on Thanksgiving of 1938.

[fol. 75] Q. After that, how did you make your first connection with the Narcotic Bureau?

A. Through an investigation in Asheville that I worked on up there with an agent.

Q. And you had not been connected with the Narcotic Bureau from 1936, when you acquired the habit, until 1938 when you were cured?

A. No, sir.

Q. Had you any connections with the Narcotic Bureau?

A. No, sir.

Q. How did you make connections in 1938?

A. There was a doctor who wanted me to go to New York and establish connections to buy for him.

Q. New York City?

A. Yes, sir.

Q. How did you make a connection with the Narcotic Bureau?

A. I didn't want to go back on the narcotics and the narcotic agent talked to me about it. I talked to him about this doctor and he asked me to see if the doctor would sell to me and he did. He was selling to everybody else.

Q. Where was that doctor; in Baltimore?

A. In Asheville.

Q. In Asheville, and what doctor was that?

A. I have forgotten his name. He has just gotten out of prison.

Q. Can you recollect it?

A. I can in a few minutes.

Q. Was he a practicing physician in Asheville?

A. Yes, sir, he has a hospital. Dr. Gardner.

[fol. 76] Q. How do you spell it?

A. Dr. G. D. G-a-r-d-n-e-r. I think.

Q. How did you contact him?

A. He knew I was in the hospital.

Q. He knew you were in the hospital in 1936?

A. He contacted me there several times. He sent his chauffeur for me to come to see him.

Q. Was he connected with the hospital where you received the cure?

A. No, sir.

Q. Was he an attending physician there?

A. No, sir.

The Court: What is the purpose of all this.

Mr. Mahoney: Merely, your Honor, to show how this young lady became an informer and to ascertain whether her statement that she is off the cure is so.

The Court: All right.

Mr. Mahoney:

Q. So this doctor in Asheville, you say, sent his car and chauffeur for you?

A. He sent to my home.

Q. You had never been his patient?

A. Yes, sir.

Q. Did you go out to his home and accept his hospitality?

A. Yes, sir, I have been to his home.

Q. And you were at his home on a number of occasions?

A. Yes, sir.

Q. As a guest?

A. No, sir, they had a tourist home and I did not go as a guest.

[fol. 77] Q. Well, living at the tourist home that the doctor conducted, you said that he made this overture to you to go to New York City?

A. Yes, sir.

Q. How long did you live at his tourist home?

A. Well, I didn't stay there regularly. I went to New York several times and over to Tennessee.

Q. Did the doctor ever go with you?

A. Not to New York, but he went to Tennessee several times.

Q. Is the doctor married?

A. Yes, sir, he is married.

Q. On how many occasions did he go with you?

A. Well, he went three or four times. In fact, his wife is an addict and she has made five years for selling dope.

Q. Did he ever go to New York with you?

A. No, sir.

Q. Anywhere else?

A. LaCross, Georgia.

Q. Was that on business?

A. For morphine tablets. He would come back on the bus with them and I would drive the car.

Q. How did you come to contact the Bureau?

A. The doctor had made several threats about me not going back to New York. He wanted me to carry somebody

else there at the addresses he had given me to show them these places. I called Mr. Dickson and told him.

Q. At that time you were in Asheville?

A. Yes, sir.

Q. And you called up Charlotte?

A. Yes, sir.

[fol. 78] Q. Did you know Mr. Dickson before?

A. No, sir.

Q. Over how long a period of time had you been going to New York and Tennessee and Georgia before you called up there in Charlotte?

A. I think probably I had made three trips to Tennessee.

Q. How many to Georgia?

A. Georgia and Tennessee are across the State line. I went to Georgia and Tennessee at the same time.

Q. But in going to those States, you were going from Asheville, North Carolina?

A. Yes, sir.

Q. You say you made a number of trips to New York City?

A. Yes, sir.

Q. How many months would you say covered those trips?

A. I think it was about three months.

Q. During those three months were you living at the Doctor's tourist home?

A. No, sir.

Q. How often in that period did you stay at his home?

A. I didn't stay over ten nights at the most.

Q. The rest of the time you were living in Asheville?

A. No, sir.

Q. Where were you living?

A. At my home in Salisbury.

Q. How far is that?

A. 130 miles, I think.

Q. Did the doctor finance these trips to Tennessee and Georgia and New York?

[fol. 79] A. Yes, sir.

Q. On those occasions that you went to Dr. Tate's office, you don't know the dates?

A. Yes, sir, I know the dates.

Q. This morning you were given some records by Mr. Rogers, which you were examining. Do you recall that?

A. It wasn't at Mr. Roger's request; it was mine, because they don't let us keep the statements we make.

Q. Are you on the Government payroll?
A. No, sir.
Q. You are not employed by the Government at all?
A. No, sir.
Q. Who employs you?
A. Mr. Middlebrooks, in Atlanta.
Q. Is he the head of this Narcotic Bureau?
A. He was at that time.
Q. Does he pay you on the case basis?
A. He pays just my expenses.
Q. Nothing else?
A. No, sir.
Q. What comes under the head of expenses?
A. You know what it costs to live a day. I think it is around $3.50 or $4.00 a day.
Q. Is that all you were allowed?
A. Yes, sir.
Q. You received no salary?
A. No, because I was not employed. They have paid me $5.00.
Q. What was the occasion when they paid you $5.00?
A. I don't know. I guess I had to have more things; [fol. 80] probably because I was spending more money.
Q. Who was spending more money?
A. I was.
Q. You mean you were given $3.50 or $4.00 for this opium derivative?
A. No, that was my expenses.
Q. They paid your traveling expenses?
A. I went in a Government car.
Q. Has all your work as an informer been in a Government car?
A. Yes, sir.
Q. And you get no remuneration other than $3.50 or $4.00 a day?
A. I think it was four and five down here.
Q. Were you paid $5.00 a day when on these visits to Dr. Tate?
A. I think it was between four and five.
Q. Could you give us any idea of what you may have had left after paying your room and board?
A. No, I didn't keep any particular account.

Q. During this time you were receiving no remuneration other than room and board. From what fund did you pay for other necessities; for your clothes?

A. I didn't spend all that for food. I tried to save enough for clothes.

Q. What did you spend for board?

A. I think $5.00 a week for a room.

Q. When out of town you had to buy your meals?

A. Yes, sir.

Q. Whatever was left out of the four or five dollars was for yourself?

A. Yes, sir.

[fol. 81] Q. You were not donating your services to the Narcotic Bureau?

A. No, sir.

Q. But you asked for no salary, but only this expense item.

A. All they paid me was $5.00 a day.

Q. And that was for expenses?

A. Yes, sir.

Q. If your expenses took four or five dollars a day, why did you donate your time to the Narcotic Bureau?

A. I don't think it took it. I saved money.

Q. Were you employed every day?

A. From September 6th until December, I think I was.

Q. That was in 1939?

A. Yes, sir.

Q. Were you laid off in 1939?

A. I was only on this case and I think it was completed at that time.

Q. You have been an informer on other cases?

A. Yes, sir.

Q. Were you paid the same thing?

A. On one or two occasions probably they paid me four or five dollars, but now down here.

Q. On those occasions that is just expense money and you get nothing for services rendered?

A. No, sir.

Q. You are sure of that now? You are paid nothing for services rendered the Government?

A. I am not.

Q. On those occasions who did you pay the money to?

A. I paid it to Dr. Tate and I think on one occasion to his nurse.

[fol. 82] Q. Did you ever pay it to anybody but Dr. Tate or his nurse?

A. No, sir.

Q. You never did?

A. No, sir.

Re-direct examination.

By Mr. Doyle:

Q. Counsel asked about your notebook. Is that it? (handing to witness).

A. Yes, sir.

Q. Were entries made there every day?

A. Yes, sir.

Q. You said you couldn't keep your book. Who did you turn it over to?

A. I turned it over to Mr. Weatherwax.

Witness leaves stand.

Court recesses until 2:00 o'clock, p. m., at which time the trial is resumed.

GEORGE C. JOHNSON, a witness produced on behalf of the United States, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Doyle:

Q. George, you are one of the defendants in this case, I believe?

A. Yes, sir.

Q. You plead guilty?

A. Yes, sir.

[fol. 83] Q. You are known by other names than George C. Johnson?

A. Yes, sir.

Q. What are those?

A. R. L. Randolph.

Q. Now, George, where do you live?

A. Augusta, Georgia.

Q. Have you been using narcotics or had you at one time?

A. Yes, sir.

Q. Are you now?
A. No, sir.
Q. When were you using it?
A. Well, up to 1939, the latter part.
Q. Did you take treatment?
A. Yes, sir.
Q. Where?
A. Milan, Michigan and Sandstone, Minnesota.
Q. Those are places operated by the Government?
A. Yes, sir.
Q. Were you sentenced there for violation of the narcotic law?
A. Yes, sir.
Q. And there you got cured. Do you know Clyde A. Foster?
A. Yes, sir.
Q. Do you know Reel B. Black?
A. Yes, sir.
Q. They both live at Spartanburg?
A. Yes, sir.
Q. Did you see either or both of them in Augusta, Georgia, in 1939?
A. Yes, sir.
[fol. 84] Q. Did they come to Augusta to see you?
A. Yes, sir.
Q. What did they come for?

Mr. Mahoney: I object, your Honor. It is incompetent, irrelevant and immaterial.

Mr. Doyle:

Q. Did you say that when Foster came to Augusta to see you, Black was with him?
A. Yes, sir.
Q. Did you then sell to Clyde A. Foster, in the presence of Reel B. Black, some morphine?

Mr. Mahoney: I object, your Honor.

The Court: This testimony so far is not admissible against the defendant, Direct Sales Company. I will admit it, as I did the prior testimony, with instructions that it is not competent as to that company.

Mr. Doyle:

Q. Mr. Johnson, did you buy morphine during that period of time from Dr. Tate at Calhoun Falls?

Mr. Mahoney: I object, your Honor, on the ground that it is incompetent, irrelevant and immaterial.

The Court: I thought we had an understanding that we would admit this testimony as against the other defendants and not competent as against your company.

Mr. Mahoney: That was true this morning, your Honor.

The Court: It is understood that counsel for the Direct Sales Company objects to all the testimony, and it is not competent at this time as against the Direct Sales Company.

[fol. 85] Mr. Doyle:

Q. During that period of time did you buy narcotics from Dr. Tate at Calhoun Falls?

A. Yes, sir.

Q. Do you remember about what time it was when you first went there to see him?

A. I believe it was—I cannot remember exactly what time.

Q. It was before you were sentenced, of course, and went off?

A. Yes, sir.

Q. In 1939?

A. Yes, sir.

Q. On your first visit to him, do you remember how much you bought? Just approximately. You don't have to state exactly how many grains.

A. I think it was about 20 tablets the first time.

Q. Do you remember whether they were grain or half-grain tablets or quarter-grain tablets?

A. Half-grain tablets.

Q. Then did you have an agreement with him to take a certain amount from him each week?

A. No, sir, but I went back later and got more and continued from there on.

Q. How often did you go there to see him?

A. Every week and sometimes twice.

Q. On what day of the week did you usually go?

A. I believe it was Tuesday and sometimes Friday.

Q. What amounts would you buy from him?

A. From 20 tablets to 500.

Q. Now, in what kind of containers were they delivered to you?

[fol. 86] A. Paper boxes, and one time they were in a Direct Sales Company bottle.

Q. With the Direct Sales Company's name on it?

A. Yes, sir.

Q. Did you ever get others in the amount of 500 except one time?

A. Yes, sir.

Q. And were any of those in bottles?

A. No, sir.

Q. And that was in 1939?

A. Yes, sir.

Q. Now, when you got sentenced at Greenville on your plea of guilty, or was it at Spartanburg that you got sentenced? At Spartanburg, didn't you?

A. No, sir, Greenville.

Q. The Court let you out for about three days after you were sentenced?

A. Yes, sir.

Q. Between that time and the time you reported to the Marshal to go off, did you go back to Calhoun Falls and buy more?

A. I did.

Q. How much?

A. As well as I remember, it was between three and four hundred.

Q. Was anybody with you at that time?

A. Black and Cox.

The Court:

Q. Who sentenced you?

A. You did, sir.

[fol. 87] Mr. Doyle:

Q. Was Reel Black an addict too?

A. Yes, sir.

Q. Was he sentenced at the same time you were?

A. Yes, sir.

Q. Did he get any of this morphine at that time?

A. Yes, sir.

Q. How much?
A. What I gave him.
Q. You gave him some?
A. Yes, sir.
Q. This Doris Cox, did you give him some?
A. Yes, sir.
Q. I believe that is a man?
A. Yes, sir.
Q. Was he a defendant in the case you were in?

Mr. Mahoney: I object, your Honor. It is not competent.

The Court: I don't think it has any bearing unless you intend to put him up later. Do you intend to put Cox up?

Mr. Doyle: Yes, sir, I have subpoenaed him.

The Court:

Q. Have you been released from the place there?
A. Yes, sir.
Q. How long did you serve?
A. Two years.
Q. You served two years?
A. Yes, sir.
[fol. 88] Q. And Cox two years?
A. Yes, sir.

Mr. Doyle:

Q. When you bought that 500 you were talking about, is that the one you said was in a bottle of the Direct Sales Company?
A. No, sir.
Q. How many were in that?
A. How many were in it?
Q. Yes.
A. In the Direct Sales Company bottle?
Q. Yes, how many half grains?
A. One hundred.
Q. Now, when you would get 100 and lesser amounts, did you see where Dr. Tate got them?
A. No, sir.
Q. At any time?
A. No, sir.
Q. Did you see what bottles he was getting them out of?
A. No, sir.

Q. Have you gone there and he asked you to wait until he could fill your order?

A. Well, I went there and couldn't get it and had to come back later.

Q. Did he ever tell you he had to go to the Postoffice; that his supply had not come in?

Mr. Mahoney: I object to that conversation. It is hearsay.

The Court: Well, it is between Dr. Tate and this witness and it would be competent.

[fol. 89] Mr. Mahoney: And on the further ground that it is leading.

Mr. Doyle: Dr. Tate has not objected.

The Court: Well, he can object to any testimony.

Mr. Doyle:

Q. How many times altogether would you say you had been there and bought this stuff from him? How many times a week would you go?

A. Once or twice; one and sometimes two.

Q. How many months did that course of business keep up?

A. I couldn't say, but I believe thirty times.

Q. How much?

A. I believe I have been there thirty times.

Q. You would go there sometimes and get a hundred?

A. Yes, sir.

Q. Sometimes four hundred?

A. Yes, sir.

Q. And sometimes five hundred?

A. Yes, sir.

Q. Where would he go and get that stuff he was selling to you?

A. At times he would have it in his cabinet in a drawer, and one time I remember he said he had to go to the Postoffice and get it.

Q. When it was in the cabinet, was it in a bottle or box there?

A. I couldn't say. He just got a container and put them in it.

Q. Did you ever go to Spartanburg?

A. Yes, sir.

Q. And go to the home of Clyde Foster?
A. Yes, sir.
[fol. 90] Q. Did you stay there at his home?
A. When I was in town I stayed there one night.
Q. And Reel Black lived in Spartanburg?
A. Yes, sir.

Mr. Mahoney: I object, your Honor.
The Court: This testimony is not competent as to the deferdant, Direct Sales Company at this time, and, therefore, I sustain the objection at this time, but if it becomes competent later it will stay in under the agreement with the attorney for the Direct Sales Company.

Mr. Doyle:

Q. Did Reel Black buy morphine from you?
A. Yes, sir.
Q. Did Clyde Foster buy morphine from you?
A. Yes, sir.
Q. Was Reel Black present at any time?
A. No, sir.
Q. How much did Clyde Foster pay you for a hundred of these?
A. Twenty-five dollars a hundred.
Q. Were they one-half grain tablets?
A. Yes, sir.
Q. And at that period of time were they the same tablets that you got from Dr. Tate?
A. Yes, sir.
Q. Did you go to Calhoun Falls at one time with this gentleman, Mr. Lanigan, the Government Agent?
A. Yes, sir.
Q. And after that you had your own connection?
A. Yes, sir.
[fol. 91] Q. You plead guilty and went off?
A. Yes, sir.
Q. And that one you bought with Mr. Lanigan, what amount was it?
A. It was 100 tablets.

Mr. Doyle: You may examine him.

Cross-examination.

By Mr. Mahoney:

Q. Did I understand you to say that you paid $25.00 for 100 half-grains?

A. No, sir.

Q. What did you say you paid for them?

A. I didn't say.

Q. You did not say what you paid for them in response to a question of the District Attorney?

A. No, sir.

The Court: I understood him to say that he sold them for that.

Mr. Mahoney:

Q. Did you sell them for $25.00 a hundred?

A. Yes, sir.

Q. At the rate of 25 cents a piece?

A. Yes, sir, that's right.

Q. Did I understand correctly that the time of your plea was in 1939?

A. The time of my plea?

Q. Yes, sir, when you plead guilty at Greenville.

A. No, sir, I don't think I made that statement.

Q. When did you plead guilty in Greenville?

A. I believe it was in 1939, but I don't believe I made [fol. 92] that statement.

Q. You said it was about September 15th, 1939, that you plead guilty in Greenville. Is that correct?

A. October 16th.

Q. October 16th, 193.. Is that correct?

A. Yes, sir.

Q. And as a result of that you were sentenced to what term?

A. Two years.

Q. And just released recently?

A. The 24th. of May of this year.

Q. So you served about a year and a half?

A. I have now served the remainder of the two years with conditional release and all.

Q. You were sentenced in October, 1939 and were released in May?

A. I served a year, eight months and sixteen days in the penitentiary and conditional release of 104 days.

Q. You have talked to the District Attorney since your release about this charge?

A. No, sir.

Q. Have you talked with him about the entry of your plea in this particular case?

A. No, sir, I have not.

Q. Did you know while you were in jail that you were indicted on this conspiracy charge?

A. Yes, sir.

Q. When were you first informed of that?

A. About the 10th or 12th of April.

Q. Of this year?

[fol. 93] A. Yes, sir.

Q. You were still in jail were you not?

A. Yes, sir.

Q. Were you taken into court and arraigned on this charge?

A. No, sir.

Q. You never have been arraigned until this morning?

A. I was taken before the Commissioner.

Q. That was after your release in May, 1941?

A. Yes, sir.

Q. Were you released without bail, do you know?

A. Yes, sir.

Q. At whose direction?

A. The Commissioner.

Q. At the time you were arraigned before the Commissioner, he knew you had just been released from prison?

A. Yes, sir.

Q. And it was for an offence prior to the time this indictment was found?

A. Yes, sir.

Q. Where were you arraigned? In what city?

A. Augusta, Georgia.

Q. You were arraigned in Augusta, Georgia before the Commissioner on this charge of conspiracy in this indictment?

A. Yes, sir.

Q. Where were you confined?

A. Milan, Michigan.

Q. Where is that?

A. In the State of Michigan.

Q. After you were released in Michigan, did you come [fol. 94] back to Augusta?

A. I wasn't released in Michigan.

Q. Where were you released?

A. Sandstone, Minnesota.

Q. Then where did you go?

A. To Augusta, Georgia.

Q. Were you arrested down there?

A. Yes, sir.

Q. And brought before the Commissioner down there in Augusta?

A. Yes, sir.

Q. And were released without bail?

A. Yes, sir.

Q. When did you first make contact with the District Attorney?

A. I haven't got any contact with him.

Q. How did you get in court today?

A. I had a subpoena from the Marshal.

Q. When were you notified?

A. I had notice a few days ago to be here on the tenth.

Q. Was the cost of transportation given you?

A. No, sir.

Q. How did you get over here?

A. At my own expense.

Q. At your own expense?

A. Yes, sir.

Q. And you had a subpoena served upon you. Is that right?

A. Yes, sir, I call it a subpoena. In other words, I was notified. I was supposed to be here. In other words, I am not very well educated. I was notified to appear here. I said I was subpoenaed.

[fol. 95] The Court: Subpoenaed and notified are the same thing, as far as that is concerned.

A. I was notified to appear here on the tenth of this month.

Q. Who told you to c e here?

A. The Commissioner.

Q. The United States Commissioner. When?

A. It was a few days ago; several days ago. I couldn't just tell when.

Mr. Mahoney:

Q. And did he tell you at that time that your case was coming up for trial?

A. Yes, sir.

Q. When you got into Greenwood, South Carolina, here, didn't you contact the District Attorney to let him know you were here?

A. No, sir.

Q. He didn't know you were here?

A. No, sir.

Q. The narcotic agents knew you were here?

A. Yes, sir.

Q. Who did you contact, Mr. Rogers?

A. No, sir, the first agent I believe I talked to was Mr. Lanigan. I beg your pardon. I met Mr. Weatherwax on the street with some persons this morning, and he told me to come on around here.

Q. You plead guilty this morning to conspiracy?

A. Yes, sir.

Q. And, of course, no promises have been made you?

A. Absolutely not.

Q. You understand that this charge of conspiracy is [fol. 96] separate and apart from the charge you plead to in October, 1939?

A. Yes, sir.

Q. How many sentences have you served other than the one you designated in October, 1939?

A. One in 1939.

Q. In addition to that.

The Court: What he wants to know is how many times you have been up for narcotics.

A. One.

Mr. Mahoney:

Q. How many other convictions have you had?

A. One.

Q. What was that?

A. Whiskey.

Q. Selling or transporting or what?

A. Transporting.

Q. How long ago was that?

A. In 1932.

Q. What is this name, R. L. Randolph, that you state to the Court and jury?

A. It is an alias.

Q. When did you take on an alias?

A. Several years ago.

Q. Was it in 1932 or 1933, before or after your conviction?

A. It was after.

Q. Why did you take it? You were not ashamed of your name were you?

A. To keep my own name and troubles away from my people.

Q. You say it was after 1933 and before 1939. Is that right?

[fol. 97] A. Yes, sir.

Q. What occurred between 1932, the time of your conviction on the whiskey charge, and 1939, this narcotic charge, what occurred that you wanted to take on an alias?

A. Nothing. I just picked the name up.

Q. Why did you pick it up if there weren't any troubles?

A. To keep my own name away from my people.

Q. You said you didn't have any troubles.

A. I just said I had whiskey trouble in 1932.

Q. You testified that you picked it up after your conviction in 1933.

A. After 1933?

Q. Were you convicted in 1933 under the name of Randolph?

A. Yes, sir. If I said 1932, I was mistaken.

Q. In this charge in 1939, you used your own name?

A. Yes, sir.

Q. Have you used the name of Randolph since 1933?

A. Yes, sir.

Q. Since 1939 you have been known under your right name of Johnson. Is that right?

A. Yes, sir.

Q. Did you talk to Mr. Lanigan of the Narcotic Bureau this morning when you arrived here?

A. Not on business.

Q. What did you talk about?

A. I just spoke to him,

Q. Is that the first time you have seen him since June, 1939?

A. Yes, sir.

Q. The very first time?

[fol. 98] A. Yes, sir.

Q. And you didn't converse with him about the case at all?

A. No, sir.

Q. Did you talk to the District Attorney about the case?

A. No, sir, I never spoke to him.

Q. How did you recollect the dates?

A. The District Attorney just asked me if I was in Calhoun Falls on the 16th.

Q. How did you know you were there on the 16th?

A. I remembered when he asked me.

Q. How did you remember you were there on June 16th, 1939?

A. I just remembered that Mr. Lanigan and I were there.

Q. At that time you were working as an informer under the direction of Mr. Lanigan?

A. Working with Mr. Lanigan.

Q. What were you being paid as an informer?

A. Per diem.

Q. What per diem?

A. And a reward.

Q. How much were you getting as per diem?

A. Three dollars a day.

Q. Did that include transportation?

A. Yes, sir. I traveled with the agent and by car.

Q. What was the reward?

A. It all depended.

Q. On what?

A. On the customer.

Q. You mean on the amount you were able to purchase from the customer or the financial standing of the customer [fol. 99] in the community?

A. It all depended on the dealer.

Q. And the terms of the deal were made by you?

The Court: You misunderstood. He said dealer.

Mr. Mahoney:

Q. But there was a deal with the dealer was there not?

A. I didn't say that. I said it all depended on the dealer.

Q. At this particular time in June, 1939, who was the dealer, Dr. Tate?

A. That's correct.

Q. In Dr. Tate's case, how much were you to get as a reward?

A. $25.00.

Q. To be paid by the United States Government?

A. Yes, sir.

Q. Provided you were able to make purchases from Dr. Tate?

A. Yes, sir.

Q. Were you to get $25.00 for every purchase you made?

A. No, sir.

Q. What was the deal you were to get for other purchases you made?

A. From ten to fifty and five hundred.

Q. What was the top amount?

A. Well, I don't think there is a top amount.

Q. Well, you had a conversation with Mr. Lanigan?

A. Yes, sir.

Q. And also other narcotic agents who used you as an informer?

A. Yes, sir.

Q. And, of course, they made an agreement with you as to how much you were to get on the cases you worked on?

[fol. 100] A. They made it approximate.

Q. Did they promise you $500.00 to make a case for them?

A. No, sir.

Q. What was the top price?

A. Well, it was approximate.

Q. If approximate, I want it.

A. As I said before, it depended on the dealer.

The Court: One minute. What he asked you was, what was the approximate amount for any dealer?

A. Twenty-five dollars was the most I ever got, your Honor.

Q. Did they ever promise more than that in any case you ever handled?

A. The only way I know how to explain it, they recommend you so much and you may get over that or not.

Q. What was the most they recommended in any case you ever handled?

A. Twenty-five dollars was the most I ever got.

Mr. Mahoney:

Q. Twenty-five dollars was the most they ever recommended?

A. That's the most I ever received.

Q. Were you promised additional money and never got it?

A. No, sir.

Q. You were promised, of course, in this Tate case $25.00 from Mr. Lanigan?

A. I don't think I was offered a reward in that.

Q. In other words, you worked on it just for your expenses?

A. I was supposed to get $25.00 or more.

Q. Did you ever get it?

A. No, sir.

[fol. 101] Q. You never got that?

A. No, sir.

Q. In June, 1939, you were promised $25.00 or more by Mr. Lanigan and in October, three months later, you wound up convicted in Greenville?

A. I never was promised anything by Mr. Lanigan.

Q. Who promised the $25.00?

A. No one promised it to me. The agent recommends so much and it ranges from twenty-five to fifty dollars.

Q. It was a recommendation of $25.00 or more?

A. Yes, sir.

Q. And the recommendation of $25.00 or more in Dr. Tate's case was given by whom, Mr. Lanigan?

A. No, sir.

Q. By another agent?

A. It would have been given by Mr. Lanigan, but the case was never finished.

Q. What agent gave it to you?

A. Not any agent gave it to me. I never received it.

Q. What agent recommended it?

A. I said that Mr. Lanigan would have been the agent who gave it, but the case was never completed.

Q. You worked on that case without any compensation at all?

A. I was caught and put up before I received it.

The Court: Go on to something else.

Mr. Mahoney: Your Honor, I want to state that this man has stated two inconsistencies.

A. Your Honor, I was supposed to receive so much and I was caught and put up before I received anything.

[fol. 102] The Court: I think you have gone into that enough.

Mr. Mahoney:

Q. Were you sent up for the purchases you made from Dr. Tate?

A. I was sent up for possession.

Q. And was the possession you were sent up for the result of what you bought from Dr. Tate?

A. Yes, sir

Q. So even though you worked for the Government as an informer according to that regular rule, you were sent up on that very same offense for that same morphine?

A. I was sent up for possession. I don't know whether it was on that offense.

The Court:

Q. Let me ask you this. My recollection is that some people came up to be sent up voluntarily for a cure of that habit.

A. Yes, sir.

Q. Were you one of those?

A. Yes, sir.

The Court: I think that explains what you are talking about.

Mr. Mahoney:

Q. You say you were released for three days after your sentence in Greenville?

The Court: I provided in the sentence that he be allowed three days to arrange his affairs.

Mr. Mahoney:

Q. On your direct examination in answer to a question of the District Attorney, you were asked if you were out for three days after sentence was passed and you said yes, and [fol. 103] then he asked if you went back to Calhoun Falls and saw Dr. Tate. Do you remember that?

A. Yes, sir.

Q. And at that particular time after you went back to Calhoun Falls, weren't you accompanied by a narcotic agent?

A. I went back with Black and Cox.

Q. And you went back and made another purchase?

A. Yes, sir.

Q. That wasn't arranging your affairs according to the order of the Court?

A. Well, I would call it arranging my affairs. At that time I was an addict.

Q. You went back to make purchases for some illegal sales?

A. I went back to make myself comfortable.

Q. You realized that the Court had not made that extension to allow you to go and get narcotics?

A. Well, if I had explained it, I don't think they would have let me. I considered it my business.

Q. Your business was dope buying and dope peddling?

A. That's about all the business a dope fiend has got, dope. I had some other business.

Q. Did you utilize your time in any other business besides dope?

A. I think I did.

Q. I don't suppose you could recall anything you did in a legitimate line during those three days?

A. I suppose I could.

Q. After you made purchases from Dr. Tate on this three-day sortie, you went and sold those didn't you?

[fol. 104] A. I don't quite understand.

Q. After you went to Calhoun Falls immediately after your sentence, you made a purchase and then you made a sale?

A. No, sir, I don't think I did.

Q. Will you swear you didn't?

A. After I was sentenced?

Q. Yes.

A. I wouldn't swear it, but I don't believe I did.

Q. You knew also that the Court had not allowed you three days to let you go and make a sale of morphine?

A. I think I understand that.

The Court: He asked if you did not know that the Court did not provide for your sentence to start three days after you plead guilty for the purpose of selling morphine.

A. I knew the Court didn't know that.
Q. He asked if you did not know that.
A. Absolutely I knew it.

Mr. Mahoney:

Q. You just abused that privilege, didn't you?
A. No, sir, I didn't abuse that privilege.
Q. Don't you think it an abuse of privilege if the Court gives you three days to straighten out your affairs and you go and buy dope and sell dope during the three days' time?
A. I straightened my affairs also.
Q. Will you please answer the question?
A. I think anyone that abused it would be, but I don't think I abused it.
Q. Well, you said you didn't think the Court had any thought that you were going to buy and sell dope during that period.
[fol. 105] A. Yes, sir, I stated that, but I straightened my affairs also.
Q. Haven't you any respect for the Court?
A. Absolutely. Your Honor, he just don't understand a dope fiend. Talking about personal business, I cannot think of anything being more personal than that. I had some business, your Honor, to straighten up and I attended to that also.
Q. When were you cured, in May?
A. I was cured in thirty days after I hit the Federal institution.
Q. You hit that about October, 1939?
A. Yes, sir.
Q. You were cured in about thirty days afterwards?
A. They considered it a cure.
Q. You didn't agree with them?
A. I had to agree with them.
Q. It didn't cure you?
A. Well, I was off of it in thirty days.

The Court: What has that to do with the case?
Mr. Mahoney: Only the lack of respect that he had for the Court order.

Q. Now, on each of these occasions you were down with Dr. Tate at Calhoun Falls, your purchase was made from Dr. Tate himself, was it?
A. Yes, sir.

Q. On all occasions?

A. Yes, sir, there at the office.

Q. And whatever was the agreement between you and Dr. Tate, the money that was paid you paid direct to him? Is that right?

A. That's correct.

[fol. 106] Q. You never knew who the Direct Sales Company, Inc., was? Is that right?

A. That's right.

Q. You never knew who their officers were and where they were, and you were not interested in the name on the bottle. You were interested in the tablets that were in the bottle. That is what you made the buy for?

A. That is one I made for the agent.

Q. After you made the buy, you brought it to Mr. Lanigan?

A. Yes, sir.

Q. And that was all of your connection with it?

A. Yes, sir.

Q. You said that on that occasion you saw something on the bottle. What was your interest in seeing what was on the bottle? Did you have any?

A. I just remembered it being a Direct Sales Company bottle.

Q. How did you remember that?

A. Well, the Direct Sales Company and the Eli Lilly Company, and there are two or three companies, and there is a difference in the morphine. There are two or three that are stronger, we think. Practically every drug addict wants to know if it is Eli Lilly, Direct Sales or Sharpe & Dohme.

Q. The addicts know all of the biggest manufacturers in the United States?

A. Not all of them, but they know the majority of them.

Q. On this particular occasion you were buying for Mr. Lanigan, and you were not interested in the strength at all?

A. That's right.

Q. So there was no occasion for you to look at the bottle?

[fol. 107] A. Nothing except to be in front of me and know what medicine I was getting.

Q. You went to make a buy?

A. Yes, sir.

Q. And when you made the buy for Mr. Lanigan, you brought it to Mr. Lanigan, so your deal was through?

A. Yes, sir.

Q. So you were not interested in the strength of the tablets?

A. Nothing except from the size of the tablets I knew what medicine I was getting.

Q. You knew from the size of the tablets?

A. Yes, sir.

Re-direct examination.

By Mr. Doyle:

Q. Mr. Johnson, at the time you went in Dr. Tate's office, when Mr. Lanigan sent you in, did he give you the money to buy?

A. Yes, sir.

Q. When you came back did you deliver them to him?

A. Yes, sir.

Q. At the same time, did you make a buy with your own money?

Mr. Mahoney: I object, your Honor. This is his witness.

The Court: I think that is leading.

Mr. Doyle:

Q. Did you buy for anyone else while you were in there?

A. Yes, sir.

Q. Is that the reason they discharged you as an informer, they found it out?

A. Yes, sir.

Q. Is that the reason you didn't get your reward?

[fol. 108] A. Yes, sir.

Q. They found out you were double-crossing them in making buys for yourself?

A. Yes, sir.

Q. And that is when the- dropped you and that is when you went to jail?

A. Yes, sir.

Recross-examination.

By Mr. Mahoney:

Q. In other words, when you were willing to play with the Government as a stool for them it was all right, but when you crossed over it was all wrong?

A. Well, that may be right.

Witness leaves stand.

DORRIS COX, a witness produced on behalf of the United States, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Doyle:

Q. Dorris, where do you live?
A. Greenville, South Carolina.
Q. Do you know Mr. Johnson, who was just on the stand?
A. Yes, I met him in October, 1939.
Q. Do you know Reel Black?
A. Yes, sir.
Q. You don't know anything about Dr. Tate?
A. No, sir.
Q. You know Black and Johnson then?
A. Yes, sir.
Q. Were you addicted to drugs?
[fol. 109] A. Yes, sir.
Q. At the same time Johnson came into court and asked for a conviction, did you also come in and enter a plea of guilty to a narcotic charge of having in possession?
A. Yes, sir.
Q. In order that you could go and get treatment?
A. Yes, sir.
Q. How long were you gone?
A. Eighteen months.
Q. Where?
A. United States Hospital at Lexington.
Q. Were you cured?
A. Yes, sir.
Q. Where did you buy your narcotics?

Mr. Mahoney: I object to it as incompetent, irrelevant and immaterial. It has nothing to do with the Direct Sales Company.

Mr. Doyle: That is correct. It has nothing to do with the Direct Sales Company.

Q. Did you ever buy from Black?
A. Yes, sir.
Q. Were you getting it from Black regularly?
A. Yes, sir.
Q. Did you ever buy any from Clyde Foster?
A. No, sir.

Q. Do you know him?
A. No, sir.
Q. This man sitting over there? (indicating)
A. No, sir.
[fol. 110] Q. Did you ever see him before?
A. Well, not to know him.

Mr. Doyle: The purpose of that testimony is just to show diversion.

Mr. Mahoney: I move to strike that out entirely as to the Direct Sales.

The Court: Counsel is correct. It is not competent at this time. Your motion to strike is granted in accordance with our understanding that if it later becomes competent it will go in.

Mr. Doyle:

Q. Are you registered under the Harrison Narcotic Act as a lot of other people are?
A. No, sir.

Mr. Mahoney: I object to that.
Mr. Doyle: That's all.
Mr. Mahoney: No questions.

Witness leaves stand.

Mrs. Hattie Sherard, a witness produced on behalf of the United States, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Doyle:

Q. Mrs. Sherard, are you the Postmistress at Calhoun Falls?
A. Yes, sir.
Q. You were subpoenaed by the Government to bring certain records at the Postoffice, records of COD packages shipped from Buffalo, New York, to Dr. Tate at Calhoun Falls. Have you those records?
A. Yes, sir.

[fol. 111] Q. Just tell us what they consist of.

A. They consist of COD cards from the Direct Sales Company, Buffalo, New York. There is a card attached to each package.

Q. Let me ask you this. These COD cards, what is the stamp over on the left? (indicating)

A. That is the time it was received at Calhoun Falls.

Q. That is the date it was received there?

A. Received at Calhoun Falls, and this is the date it was mailed out from Buffalo. (indicating)

Q. And is that the usual custom of the Postoffice in stamping them that way?

A. Yes, sir.

Q. And it shows who they are from in each case?

A. Who they are from and the addressee on the back. It shows who the package was delivered to and the date of delivery.

Q. In some cases does it show delivery to some person other than Dr. Tate?

A. Yes, sir.

Q. In those cases who would it be?

A. His nurse usually or whoever came getting his mail; his son sometimes.

Q. What does this book show? (indicating)

A. The number of the parcel, the office of origin, the amount, the Doctor's name, and that is the amount of the money order going back to the Company and the date it was sent. (indicating)

Q. After you received the subpoena, did Mr. Weatherwax and Mr. Lanigan come to Calhoun Falls and assist you in going through your files and getting up these things?

A. Yes, sir.

[fol. 112] Q. And after they had done so and in your presence, you still having custody of these things, did they make up a tabulation of those things showing the date of origin and the date of delivery to Calhoun Falls and the other things shown on there?

A. Yes, sir.

Mr. Doyle: I offer all of them in evidence in bulk.

The records from the Postoffice at Calhoun Falls, S. C., consisting of six books and a group of COD cards, herein-

above identified and referred to, are admitted in evidence as *Government's Exhibit #1.*

Q. Have you got all of the COD car-s there?

A. Yes, sir.

Q. Of course they are the property of the Postoffice and we will take care of them.

A. Do you want me to leave them?

Q. Yes. These books and cards, the same manner of handling that applies to one of them applies to all?

A. Yes, sir.

Cross-examination.

By Mr. Mahoney:

Q. I would like to ask this witness one question. These books seem to form a continuity down to 1940, and they are a record of parcels received for delivery. Is that correct?

A. Yes, sir.

Q. The content of them covers a multitude of individuals, does it not?

A. Yes, sir.

Mr. Mahoney: In view of that, Mr. District Attorney, I assume that your only purpose in offering them is to show [fol. 113] deliveries to Dr. Tate from the Direct Sales Company?

Mr. Doyle: That is correct.

Mr. Mahoney: You are only offering them as to Dr. Tate?

Mr. Doyle: Only that portion that relates to Dr. Tate and the Direct Sales Company.

Mr. Mahoney: I have no objection to that whatever, your Honor.

Q. In regard to the receipt of these cards in the first instance, these that are in evidence as part of Government's Exhibit #1, those would be received at the Postoffice at Calhoun Falls, S. C. Is that correct?

A. Yes, sir.

Q. And, of course, as you noted from the face of them, they were from the Direct Sales Company to Dr. Tate?

A. Yes, sir.

Q. When it was called to your attention that it was COD, that was significant to you that you were to collect that

amount of money before you were to deliver it to Dr. Tate?

A. Yes, sir.

Q. You mentioned a money order, but was that the method of handling the business? Would Dr. Tate or his nurse deliver the money order to you before you delivered the package?

A. They gave me the cash for the package.

Q. I was trying to find out the procedure.

A. Yes, sir.

Q. When you had a package COD, your duty was to collect before you delivered it and you would get the cash and then you delivered the package?

A. Yes, sir.

[fol. 114] Q. And then you took the cash you received and would remit to the Direct Sales Company?

A. By money order.

Q. And do you remember the approximate amount you were remitting on each of these?

A. The amount is on each one.

Q. The amount is on the face of each one. Is that correct?

A. Yes, sir.

Q. I show you part of this particular exhibit and when you say that the amount is on the face of it—that is $20.74? (indicating)

A. $20.74 plus the fee of 15 cents.

Q. That is the handling charge?

A. Yes, sir.

Q. Where does the 15 cents go; to the Government?

A. Yes, sir.

Q. It is that particular charge which you would collect?

A. You collect both the amount and the fee.

Q. But the fee is set by yourself?

A. Yes, sir, it depends on the amount of the order.

Q. That is your handling charge. Is that right?

A. Yes, sir.

Q. Would it be possible for you to refer to one of these particular books and just give me a Dr. Tate? Could you readily refer to one of them?

A. Here is one. (indicating)

Q. Referring to one of the records of COD parcels received for delivery, a part of Government's Exhibit #1, it shows here "10-22-34". Is that correct?

[fol. 115] A. Yes, sir.

Q. Then there is the parcel number on it?
A. Yes, sir.
Q. Then "Buffalo, New York."
A. Yes, sir.
Q. "$5.60. Dr. Tate."
A. And that is the number of the money order and the date it was sent. (indicating)

Mr. Mahoney: That is all, your Honor.

Witness leaves stand.

Court recesses for a few minutes and then resumes:

Dr. John Victor Tate, a defendant, produced on behalf of the United States, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Doyle:

Q. Dr. Tate, you practice medicine at Calhoun Falls?
A. Yes, sir.
Q. How many years have you been practicing there?
A. Thirty-four.
Q. Thirty-four years. I have forgotten exactly what term of court it was, but at Greenville did you or not enter a plea of guilty there to a substantive offence?
A. I did.
Q. Which is part of this same transaction?
A. I think so.
Q. And that case has been disposed of?
A. Yes, sir.
Q. Dr. Tate, from whom have you bought the major portion of your morphine sulphate?

[fol. 116] Mr. Maloney: I object on the ground that it is a conclusion.

Mr. Doyle: I think it is a proper question.

The Court: During what time, Mr. District Attorney. You say the major portion of it. You should make it more definite.

Mr. Doyle:

Q. From the year 1932 until your case at Greenville.

Mr. Mahoney: I object to that.
Mr. Doyle: I haven't finished the question.

Q. From the year 1932 until June, 1940, from what company did you buy the majority of morphine sulphate that you used?

Mr. Mahoney: I object, your Honor, on the ground that it is not within the period designated in the indictment. The District Attorney, who drew this indictment, stated that it was from May, 1933, and designates it now as 1932.
Mr. Doyle: I meant from 1933 until June, 1940.

A. The major portion was bought from the Direct Sales Company, Buffalo, New York.
Q. Let us explain to the jury how morphine is obtained. You were registered at that time with the Collector of Internal Revenue?
A. I was.
Q. And were thereby permitted to order morphine?
A. I was, yes, sir.
Q. Now, what do you do, Doctor, to obtain any quantity of morphine from a wholesale dealer?
A. Well, Mr. District Attorney, you mean go back and tell how we get our order forms, or just what we do to get the morphine?
[fol. 117] Q. Let me show you this. Are these forms furnished you by the Collector of Internal Revenue? (handing paper to witness)
A. They are.
Q. What do you pay for a book of them?
A. Ten forms for ten cents.
Q. In other words, a cent apiece?
A. Yes, sir.
Q. These are known as official order forms?
A. They are.
Q. Did the agents investigating your case take up your duplicate order forms?
A. Yes, sir.
Q. In other words, when you make out the form to send to the wholesaler, you keep a duplicate order form?
A. I do.
Q. And the law requires that you keep them for a period of two years?
A. Two years, I believe.

Q. And after that you can destroy them, and the ones gotten for your case were the ones you had for that two-year period?

A. I think so. Sometimes we don't destroy them.

Q. In 1933 and 1934, did you destroy those as the law permits?

A. They were destroyed.

Q. Will you look at these and go through them? (handing to witness)

A. Is it necessary to go through each one of these?

Q. Just see if they are the ones.

The Court: Submit them to counsel first. Maybe he will agree they are correct.

[fol. 118] Mr. Mahoney makes no objection.

Mr. Doyle: I offer these in evidence.

Group of duplicate order forms for opium, etc., consisting of 13 books issued to Dr. J. V. Tate, Calhoun Falls, S. C., hereinabove identified and referred to, are admitted in evidence as Government's Exhibit #2.

Q. Now, Dr. Tate, they appear to be dated from March 25th, 1938 to January 27th, 1940. Here is another batch of them and altogether they appear to go from November 24th, 1937 to January 27th, 1940.

A. That is about correct.

Q. The original and you retain this. It shows the amount you order, the date you order it, the person from whom you order it, and it gives your number from the Collector of Internal Revenue?

A. Yes, sir.

Q. Doctor, when you were ordering from this company, what amounts were you ordering each time?

Mr. Mahoney: I object. The exhibit speaks for itself and it is the best evidence.

The Court: What do you say, Mr. District Attorney?

Mr. Doyle: That is correct. I thought we might shorten it some.

Q. Dr. Tate, not having the order forms to go by because they are destroyed by age, do you remember when you first began to buy from this company?

A. No, I do not. I began to buy drugs from that company perhaps ten or fifteen years ago.

[fol. 119] Q. In what year did you begin to buy from them with any regularity?

A. Probably 1934 or 1935.

Q. Were you ordering from them sometimes in 1932?

Mr. Mahoney: I object. That is outside of the date of the indictment.

The Court: He means 1933. He says 1932 but means 1933.

A. I don't remember exactly.

Mr. Doyle:

Q. But the records would show?

A. Yes, sir.

Mr. Doyle: I will have to go through those order forms one at a time.

The Court: Do you have those things tabulated?

Mr. Doyle: Mr. Weatherwax made a tabulation of them.

The Court: Why don't you put him on the stand and prove the tabulation?

Mr. Doyle: I will do that.

Q. Who did you turn that over to, Mr. Weatherwax? When the agents came to your office, you turned it over to them?

A. Yes, sir.

Q. How long did you continue to buy narcotics from this company?

A. I think January, 1940.

Q. Did you take from the postoffice the last order you made?

A. No, I did not.

Q. Was it returned to the company?

A. It was returned. I presume.

[fol. 120] Q. Was that subsequent to this investigation?

A. This order was made about the time of this investigation.

Q Is that why it was returned?

Mr. Mahoney: I object on the ground that it is irrelevant, incompetent and immaterial.

The Court: I will admit it for the time being.

Mr. Doyle:

Q. When you returned it, did they write and ask you why you returned it?

A. No, they did not.

Q. Did you ever hear from them?

A. It was some kind of form to show that the order was not filled.

Q. It was the original order form?

A. I don't think it was the original order form, but some kind of form they send out to show the order was never filled.

The Court: That form is the best evidence. Do you have that?

Mr. Doyle: Yes, sir, we have that.

The Court: That is the best evidence.

Mr. Doyle:

Q. As to that one, I will show you this order form dated July 12th, 1940. Is that the last one? (handing to witness)

A. That is a later date than I was thinking.

Q. I show you that to refresh your memory. Is that the one they returned?

A. Yes, sir, this is the one.

Q. With that notation attached to it?

A. Yes, sir.

[fol. 121] The Court. Submit it to counsel.

Mr. Doyle submits papers to counsel.

Mr. Mahoney: No objection, Mr. Doyle.

Order form dated July 12, 1940, Direct Sales Company, Inc. to Dr. J. V. Tate, with note attached from Direct Sales Company, Inc. to Dr. J. V. Tate, dated July 16, 1940, hereinabove identified and referred to, is admitted in evidence as Government's Exhibit #3.

Mr. Doyle:

Q. Now, this is the original they returned? (Indicating.)

A. That is not the original.

Q. It is what they sent you?

A. Yes, sir.

Q. It is their record rather than yours?

A. Yes, sir, I don't think that is mine.

Q. "Dear Doctor: Please file the enclosed blank with your original order to show what disposition has been made of the tablets," and it shows simply that you returned it to them. That is all you heard about it?

A. Yes, sir.

Q. This was designed to clear their records and yours at the same time?

A. Yes, sir.

Q. Doctor, from 1933 until 1940, were you receiving the Company's catalogues and prices?

A. I did, a small bulletin or catalogue.

Q. About how often would you get that catalogue?

A. I don't know. Sometimes maybe one a month or two or three a month.

[fol. 122] Q. How did their prices on narcotics correspond with the prices of other houses?

Mr. Mahoney: I object on the ground that it is incompetent, irrelevant and immaterial.

The Court: Objection overruled. Exception noted and allowed.

A. I could buy a little cheaper from the Direct Sales Company.

Q. Much cheaper?

A. Considerably cheaper than from other houses.

Q. The prices would change?

A. They would fluctuate up and down.

Q. Did you get those catalogues with some regularity?

A. Frequently.

Q. They listed narcotics, as they did other preparations, by catalogue number?

A. They did.

Q. This figure, '982", is that the catalogue number on narcotics?

A. Yes, sir, I judge it was.

Q. Did you continue to get those catalogues up to the time you ceased to do business with them?

A. I think I get one occasionally from the company yet.

Mr. Mahoney: I object to what he thinks, and move to strike it out.

The Court: Motion granted.

Mr. Doyle:

Q. Did you receive them up to the time of the investigation?

A. I did.

Q. Here is one, June 28th, 1939. In the left-hand column [fol. 123] what do those numbers indicate?

A. This is the catalogue number. (Indicating.)

Q. All right, sir. Now, 981 is what?

A. 981 is for 100 quarter-grain tablets of morphine sulphate.

Q. And in that order, you ordered one package of 100 quarter-grain tablets?

A. Yes, sir.

Q. What is 982?

A. That represents their catalogue number for 1000 one-half grain morphine sulphate tablets.

Q. On that particular form you ordered 100 quarter-grain tablets and 1000 half-grain tablets?

A. Yes, sir.

Q. Do you have any independent recollection of what happened to that order?

A. I recall they didn't sent the 100 quarter-grains and made some statement as to why they couldn't. I don't recall what their statement was.

Q. Look on their letter of June 30th, 1939, and see if that is what happened to that order (handing paper to witness).

A. This is what I received.

Q. This is a letter you received from them in the mail?

A. Yes, sir.

Mr. Doyle: I offer this in evidence.

Letter from Direct Sales Company, Inc. to Dr. J. V. Tate, dated June 30, 1939, is admitted in evidence as Government's Exhibit #4, and is published to the jury by Mr. Doyle.

Q. Now, you received then the 1000 half-grain tablets that were ordered June 28th, 1939, from them?

[fol. 124] A. I did.

Q. Now, Doctor, I show you your duplicate of July 3rd, 1939, ordering again 1000 half-grain tablets of morphine. Did you order that?

A. I did.

Q. And that was five days after the order that this letter refers to?

A. Yes, sir.

Q. Now, Doctor, state whether or not you sold morphine to these men who testified this morning that they bought it from you?

Mr. Mahoney: I object to that, your Honor. It is incompetent, irrelevant and immaterial as to the Direct Sales.
The Court: Well, I will let it in for the time being.
Mr. Mahoney: Exception requested.
The Court: Exception allowed.

A. I did, I think, to all of them, but I don't remember.

Mr. Doyle:

Q. Don't the law require you to keep a dispensing record?
A. It does.
Q. So when you order morphine, on your dispensing record the law requires you to put down what you dispense?

Mr. Mahoney: I object on the ground that it is incompetent, irrelevant and immaterial. What the law requires the Doctor to do is not binding on the Direct Sales. You already have testimony that the Direct Sales is a manufacturer and wholesale dealer.
The Court: I will charge the law when I submit the case [fol. 125] to the jury. The question is what he did do.

Mr. Doyle:

Q. You heard them testify. Did you make sales to them?

Mr. Mahoney: Same objection with exception reserved.
The Court: Exception noted.

A I think I did to each one who testified this morning.

Mr. Doyle:

Q. Did they submit an order form?

Mr. Mahoney: I object to that on the same ground, that it is incompetent, irrelevant and immaterial.
The Court: Same ruling.

A. They did not.

Mr. Doyle:

Q. Did you usually require an order form?
A. I usually dispensed it to them.

Mr. Mahoney: I object.
The Court: Same ruling.
Mr. Mahoney: Exception.

The Court: I will except for you.

Mr. Mahoney: I want the record straight.

Mr. Doyle:

Q. Doctor, following that letter—after the receipt of this letter, did you, or do you remember whether or not for the next thirty days you ordered more from them and received more narcotics from this company than you had in any thirty days before?

Mr. Mahoney: I object to that on the ground that it is incompetent, irrelevant and immaterial.

The Court: Objection overruled and exception allowed.

[fol. 126] Mr. Mahoney: I wish to point out that the exhibits here are up to and including 1940.

The Court: Your objection is that the order forms are the best evidence?

Mr. Mahoney: They are the best evidence.

The Court: That is correct.

Mr. Doyle:

Q. Doctor. I want to show you one of the catalogues you spoke of coming from them. Look at this and see if that is substantially like all the other catalogues, you got from them, except for periodic price changes. (Handing pamphlet to witness.)

A. Yes, sir, it is.

Q. Made up like this, most of them?

A. Yes, sir.

Q. And having that pink slip in them, "Narcotic Preparations"?

A. I don't recall that so much, although the narcotics are listed in there.

Mr. Doyle: Simply mark it for identification.

The catalogue hereinabove referred to being No. 89, is marked for identification: "Government-A".

* * * * * * *

After instructing the Jury, the Court announces a recess until ten o'clock tomorrow morning.

* * * * * * *

Court convenes at ten o'clock, a. m., November 11, 1941, but is recessed for the observance of Armistice Day Exercises until two o'clock, p. m., at which time the trial is resumed.

* * * * * * *

[fol. 127] Dr. John Victor Tate: Defendant, produced on behalf of the United States, recalled:

Direct examination.

Continued by Mr. Doyle:

Q. Doctor, the orders for morphine that you made from the Direct Sales Company, did they or not all come by COD at the Postoffice at Calhoun Falls?

A. They did at least for the last several years.

Q. The last several years?

A. Yes, sir.

Q. Now, when those orders came there, did you get them out in every case or not?

Mr. Mahoney: I object, your Honor. It is incompetent, irrelevant and immaterial. As far as the Direct Sales was concerned, we shipped it to the consignee as designated to the Postoffice at Calhoun Falls, S. C.

The Court: What is your purpose?

Mr. Doyle: Quite a number of the receipts were signed by Ruth Hill. I want to prove she was his agent as his nurse.

A. The truth of the matter is she got out quite a number.

Q. She was your agent at the Postoffice?

A. Yes, sir.

Q. Is it true that two of the orders came out of the Postoffice at the same time?

A. It is possible.

Mr. Mahoney: I object to it being possible.

The Court: Objection sustained. You must tell what you know, not what is possible.

[fol. 128] Mr. Doyle:

Q. Of course, the record will show at the Postoffice?

A. Yes, sir.

Mr. Doyle: You may examine him.

Cross-examination.

By Mr. Mahoney:

Q. Doctor Tate, prior to June 1st, 1940, you were registered with the Treasury Department or the Commissioner of Narcotics, were you not?

A. I was.

Q. And you were registered with them for a number of years prior to that particular time?

A. I was.

Q. Can you recollect, Doctor, when you were first registered with the Bureau of Narcotics and were first authorized to handle and dispense narcotics?

A. I will have to make an estimate. About June or July, 1907.

Q. 1907 is your best recollection?

A. Yes, sir.

Q. And you know that under the Narcotic Act it is essential that you register every year?

A. Yes, sir. When I say 1907, I don't believe the Harrison Narcotic Law was in force, but I registered when it came in force.

Q. It was enacted in 1914, I think. If that statement is correct, you registered the first year it was necessary for physicians to register?

A. I did.

Q. And you have registered each and every year up to [fol. 129] and including 1940; is that correct?

A. Yes, sir.

Q. Of course, during this particular time referred to as sales having been made by you to Johnson, Miss Lamar, and others, up to June, 1939, you were registered up to that particular time?

A. I was.

Q. Now, Doctor, in May, 1940, you were indicted by the grand jury for the Western District of South Carolina on a charge of illegally selling narcotics, were you not?

A. I was.

Q. And on the 2nd of June, 1940, that is, three or four days thereafter you appeared before a Commissioner here and was arraigned, were you not?

A. I was.

Q. And you were directed at that time to appear at the Greenville term of Court. Do you recollect that?

A. Yes, sir.

Q. Now, on October 21st, you appeared in the Federal Court at Greenville?

A. My recollection is that it was in November.

Q. The record itself, Doctor, over the signature of Judge Wyche, snows the 21st of October, 1940. Would that have a tendency to refresh your recollection?

A. That is correct then.

Q. Doctor, in that indictment you plead guilty to four counts?

A. Yes, sir, I think there were four counts.

Q. Have you any independent recollection of what the four counts were?

[fol. 130] A. I do not.

Q. It consisted of three sales to Ruby Lamar and one to one sale to Albert P. Rogers?

A. I think that is correct.

Q. You plead guilty to all counts?

A. Yes, sir.

Q. Now, Doctor, I ask you to examine the third count, just as to the date, that on the 18th day of November, 1939, at Calhoun Falls, you sold to Ruby Lamar 100 half-grain tablets. Do you notice that? (Showing to witness).

A. Yes, sir.

Q. That is the third count of the indictment that you plead guilty to?

A. Yes, sir.

Q. I call your attention to overt act 38. "That on November 18, 1939, at Calhoun Falls, South Carolina, the said Dr. John Victor Tate sold to Ruby Lamar, in an unstamped and unlabeled container, 100 H. T. morphine sulphate ½ grains." It is the same date is it not?

A. Yes, sir.

Q. It is the same individual?

A. Yes, sir.

Q. You are the doctor in the overt act?

A. Yes, sir.

Q. And you are designated in that overt act?

A. Yes, sir.

Q. And you notice the amount is 100 half-grain tablets?

A. Yes, sir.

Q. In this indictment where you were indicted for selling, [fol. 131] you plead guilty to actually selling to Ruby Lamar?

A. That was my idea.

Q. And you notice that the third count is the 38th overt act in this present indictment?

A. Yes, sir.

Q. I ask you to look at the fourth count, that on November 18th, 1939, you sold to A. P. Rogers 200 half-grain tablets, and I ask you to look at the 39th overt act in this present indictment. "That on November 18, 1939, the said Dr. John Victor Tate, at Calhoun Falls, South Carolina, sold to Albert P. Rogers, in two unstamped and unlabeled containers, 200 H. T. morphine sulphate ½ grains." It is the same date is it not?

A. Yes, sir.

Q. It is Dr. Tate in each of them, isn't it?

A. Yes, sir.

Q. The place at Calhoun Falls, S. C. is the same?

A. Yes, sir.

Q. The person to whom you sold is the same?

A. Yes, sir.

Q. And the amount that you sold is the same. Is not that right?

A. Yes, sir.

Q. Now, you plead guilty to that before Judge Wyche on October 21st, 1940. Isn't that right.

A. That is correct, I would say.

Q. Now, you have plead not guilty here to this indictment for conspiracy?

A. Yes, sir.

Q. Is that on the advice of your counsel?

[fol. 132] A. It was on the advice of my counsel and my own opinion, also, that there was no conspiracy.

Q. In other words, you believed when you entered your plea in 1940 that you were guilty of selling to these individuals, but that there wasn't any conspiracy between you and the Direct Sales Company and the other defendants. Is that correct?

A. Yes, sir.

Q. That is your construction?

A. Yes, sir.

Q. And that is how you justify your plea of not guilty in this case?

A. Yes, sir.

Q. In view of the fact that you plead not guilty, on whose advice is it that you come here and testify on behalf of the Government?

A. The District Attorney just called on me to testify. I didn't know I was testifying on behalf of the Government.

Q. You didn't know that on the opening day the District Attorney stated in open court that the plea as to yourself would be accepted, but that you would be here to testify for the Government?

A. I heard that. I knew I was going to be a witness.

Q. And you knew who you were going to be a witness for? You heard in court yesterday that you were going to testify on behalf of the Government?

A. I heard that.

Q. Your attorney assured you why you were testifying for the Government, didn't he?

A. I don't know as I understood why I was summoned [fol. 133] to testify for the Government.

Q. When you heard that in court yesterday morning before the reception of any evidence, didn't you confer with your attorney about that?

A. I talked with him some.

Q. Didn't he tell you at that time that you were to testify for the Government?

A. He told me I was summoned as a Government witness.

Q. And knowing your constitutional rights, you didn't know you were going to testify on behalf of the Government?

A. No, sir, I didn't.

Q. You considered that you were guilty of a substantive offence, but that you were not guilty of conspiracy?

A. Yes, sir.

Q. Now, showing you Government's Exhibit #3, in your direct testimony yesterday you referred to this as a narcotic order, that is, while Mr. Doyle was examining you, as a narcotic order that had been executed by you and directed to the Direct Sales. Do you remember that?

A. Yes, sir.

Q. That is not so is it, Doctor? That is not an order that was executed by you to the Direct Sales? Just answer my question.

A. This is not.

Q. On your direct examination yesterday when you said that was a narcotic order executed by you to the Direct Sales for 1000 half-grain tablets, you were in error in that yourself?

A. Yes, sir.

Mr. Doyle: He corrected that.

[fol. 134] Mr. Mahoney:

Q. Then after that and after the District Attorney had introduced that in evidence, you did correct it and said that that was not an order from you to the Direct Sales, but an order from the Direct Sales to you?

A. I think that is correct.

Q. Well, there is no question about it. Will you just look at the bottom of it? It is executed by the Direct Sales Company, Inc., by George J. Dotterweich, Jr.?

A. Yes, sir.

Q. That is an explanation as to your order of May 24th, 1940 which you say you sent to the Direct Sales Company and which you were unable to pick up because of the fact that your license at that time had been rescinded. Is that right?

A. My license had not been rescinded, but my patient for whom I ordered this removed the necessity and I did not need it.

Q. Even though the Government, according to Mr. Lanigan's testimony on yesterday that he started to buy from you on June 16th, 1939, still on the 24th of May, 1940, the Government had not stepped in and taken your license to prescribe for narcotics from you?

A. No, sir.

Q. You were still registered to do business?

A. Yes, sir.

Q. And you also had, during that period of time, forms in your possession issued by the Collector. Where is he, at Charleston, S. C.?

A. In Columbia.

Q. You still had forms in your possession issued by the [fol. 135] Collector at Columbia, S. C. that allowed you to continue to order narcotics? Is that right?

A. Yes, sir.

Q. So this Government's Exhibit #3 that is in evidence is merely the manner that is prescribed by the Act and regulations so that the Direct Sales Company could show that that one package of 1000 half-grains had not been delivered and received by you. Is that correct?

A. That was my understanding.

Q. Well, you are familiar with this law to some extent and some of the regulations?

A. Yes, sir.

Q. Now, Doctor, from the files of the Direct Sales Company I show you an original narcotic order dated May 24th, 1940, number 1378, Dr. J. V. Tate, Calhoun Falls, S. C., District of South Carolina, Class 4, issued 2-9-40 by W. P. Bowers, Collector, directed to the Direct Sales Company, Inc., Buffalo, New York, for 1000 ½ grains H. T. Morphine Sulphate, and signed J. V. Tate. You have seen that?

A. Yes, sir.

Q. The last time you saw it was sometime in May, 1940, when you sent it to the Direct Sales Company?

A. Yes, sir, I executed it and sent it on.

Mr. Mahoney: I will ask you to make this for identification. It can be marked in evidence, your Honor.

The Court: Let it be admitted.

Original order form from Dr. J. V. Tate to Direct Sales Company, Inc., dated May 24, 1940, hereinabove identified and referred to and being #E78513, is admitted in evidence as Defenda-t's Exhibit #1.

[fol. 136] Q. Doctor, as you state, this Defenda-t's Exhibit #1 in evidence is an order sent to the Direct Sales on May 24th 1940, and which you did not pick up in Calhoun Falls?

A. The thing that was kind of confusing to me is this date of July 12th. That is confusing there. I think that is correct.

Q. Now, Doctor, you testified here yesterday in response to a question asked by Mr. Doyle of you that you didn't think that the Direct Sales Company had done anything in regard to your original order of May 24th, 1940 that had been sent through to them and which you had not picked up at Calhoun Falls when it was delivered.

A. Now the presumption is that in answering that question when I said they had not done anything, I knew they had sent this here. (indicating)

Q. Yes, sir, they did send this Government's Exhibit #3, which is an order from the Direct Sales to you. You said they had not said anything about the order or done anything about it. Now, do you recollect that that was your testimony to Mr. Doyle yesterday?

A. I know I didn't take it out of the postoffice.

The Court: He asked if you recalled that.

A. I just cannot follow that.

Mr. Mahoney:

Q. Yesterday you testified in response to a question by Mr. Doyle that the Direct Sales Company had done nothing whatsoever about the order.

Mr. Doyle: Now, your Honor, I don't want to interrupt. I don't want to dispute my friend, but I don't think he said that.

[fol. 137] The Court: He is asking whether he testified that or not.

A. It is just kind of confusing to me.

Mr. Doyle: Now, this as I understand is the record. He refused to take it and it went back. Then I asked him if he had received this and then he said he had, and I read this thing attached to it and I introduced it in evidence. Then I asked if they had written a letter or did anything else and he said no.

Mr. Mahoney: That is the question.

Q. So there won't be any confusion, as Mr. Doyle put it, he said did they write you a letter or do anything in addition to sending this Government's Exhibit #3, and you said no. Is that right?

A. I think that is right.

Q. And, of course, Doctor, you were testifying from your best recollection. Is that right?

A. Yes, sir.

Q. Now, Doctor, I show you a letter from the Direct Sales Company directed to Dr. J. V. Tate, Calhoun Falls, S. C., dated June 18th, 1940, and signed Direct Sales Company, Inc., by George J. Dotterweich, Jr., President, and it says—

Mr. Doyle: Before you read it, may I see it?

Mr. Mahoney: Yes, you may, without revealing it to the witness.

Mr. Doyle: No objection.

Mr. Mahoney:

Q. Now, Doctor, this letter that is addressed to you, you notice it is to Dr. J. V. Tate, Calhoun Falls, S. C. There are [fol. 138] not two doctors down there of that name?

A. No, sir, not of that name.

Q. "Our Receiving Department today reports the return of your COD order of May 27th, 1000 morphine sulphate ½ grain tablets #382. In order that we may adjust this matter to your entire satisfaction, will you kindly let us hear from you in the enclosed stamped envelope? Yours very truly, Direct Sales Company, Inc., (signed) George J. Dotterweich, Jr., President." Now, before answering the next question, I ask you to look at this Defendants' Exhibit #1. You notice the date of it, do you not? (handing paper to witness).

A. Yes, sir.

Q. You notice it is for one package, 1000 ½ grain morphine sulphate tablets?

A. Yes, sir.

Q. And you sent it out on the date 5-24-40 or the following day, wasn't that your policy?

A. Yes, sir.

Q. Now, I ask you if you didn't receive that letter of June 17th, 1940 from the Direct Sales Company?

A. I think I did.

Q. I want to convince you. Look at this bottom part, Is that your writing? (indicating)

A. Yes, sir.

Q. "License suspended temporarily. Therefore cannot take out and possess this order. Yours truly, J. V. Tate."

A. The "license suspended temporarily" was incorrect, because my license has never been suspended.

The Court: The question he asked was did you write [fol. 139] that.

A. Yes, sir, I did.

Mr. Mahoney:

Q. Then you did write this?

A. Yes, sir, I did.

Q. When you stated yesterday that you didn't get that, you were mistaken?

A. Yes, sir, it was just a matter of recollection.

Q. Now, I call your attention to a letter directed to you by the Direct Sales Company, dated July 2nd, 1940, fifteen days from this letter. "Dear Sir: According to our records we are still holding the 1000 morphine sulphate ½ grain tablets, #982, which were returned to us on June 17th as the COD was not taken up. As we wish to adjust this matter to your entire satisfaction, will you kindly let us hear from you at your earliest convenience. Direct Sales Company, Inc." Now, do you remember receiving the second one?

A. Yes, sir, I received that.

Q. You received that. Now, Doctor, isn't it a fact that after you received this last letter, you took this letter of June 17th and wrote this on the bottom to the company and mailed it?

A. I believe that is correct.

Q. So, Doctor, whereas yesterday you said they had not done anything about it, now that your recollection is refreshed you know they wrote you two letters about it?

A. I think that is right.

Q. Well, is there any dispute about it?

A. No, sir.

Q. You know that is correct?

[fol. 140] A. Yes, sir.

Mr. Mahoney: I will offer these if there is no objection.

Letter from Direct Sales Company, Inc. to Dr. John V. Tate, dated June 17, 1940, hereinabove identified and referred to is admitted in evidence as Defendants' Exhibit #2.

Letter from Direct Sales Company, Inc. to Dr. John V. Tate, dated July 2, 1940, hereinabove identified and referred to is admitted in evidence as Defendants' Exhibit #3.

Q. Now, Doctor, on yesterday this Government's Exhibit #4 was introduced in evidence and that was relative to an order that you had sent through to the Direct Sales Company wherein you ordered two items, one package of 100 morphine sulphate ¼ grain tablets and one package of 1000 morphine sulphate ½ grain tablets. Do you recollect that?

A. Yes, sir.

Q. And, upon mailing that order to the Direct Sales Company, you received this letter of June 30th, 1939, or within a day or — thereafter. Isn't that right?

A. Yes, sir.

Q. In which they told you—they referred to your order for 1000 ½ grain and 100 ¼ grain tablets. Is that right?

A. Yes, sir.

Q. In this letter they stated that the maximum quantity they could supply on an order was 500 grains morphine sulphate, and in view of that fact they were filling the order for 1000 ½ grains and were not filling your order for the other. Is that correct?

A. Yes, sir.

[fol. 141] Q. Now, Doctor, had you ever sent through an order before that, an order in excess of 500 grains?

A. I had not.

Q. This was your first experience in ordering beyond 500 grains, and in your first experience in ordering beyond 500 grains the company refused to fill it?

A. Yes, sir.

Q. And they only filled your order for 1000 ½-grains. Is that correct?

A. Yes, sir.

Q. Did you know what they were referring to in the letter when they said, "The maximum quantity any manufacturer can supply on an order is 500 grains morphine sulphate."

A. I just inferred that that was a ruling of the Narcotic Department. That was my inference.

The Court: What is the date of that letter?

Mr. Mahoney: June 30th, 1939, Government's Exhibit #4.

Q. Now, Doctor, having registered with the Commission of Internal Revenue or its subsidiary, the Bureau of Narcotics, you received a registration number did you not?

A. I did.

Q. As appears from the exhibits on behalf of the Government it was 1378. Of course, that number was given you by the Commissioner of Internal Revenue?

A. It was.

Q. And each year when you renewed your application for registration, the same number was issued to you?

A. It was.

Q. And under the Harrison Narcotic Act you were in Class 4?

[fol. 142] A. Yes, sir.

Q. You know something of the classifications under the Act?

A. I know something of that.

Q. And you were in Class 4 and that is the class under which you were registered?

A. It was.

Q. Now, Doctor, after you received your registration, in order to receive narcotics it is essential that you make application to the Collector of Intern l Revenue for your district for narcotic order blanks?

A. It is.

Q. And before you can get any blanks it is essential that you execute a form prepared by the Bureau called a requisition?

A. It is.

Q. I show you a blank requisition here for opiates, etc., and ask if that is a duplicate of the form that was given you by the Collector at Columbia?

A. It is.

Q. Now, that is the form given you for the purpose of executing, is it not?

A. Yes, sir, it is.

Q. And what you must do is fill it out and execute it, giving your name, number, street address and town?

A. Yes, sir.

Q. And before you get any of these books from the Collector at Columbia, it is essential that you execute one of these blanks?

A. Yes, sir.

Q. And in this particular class you are in, you could only [fol. 143] get one book of ten duplicate originals at a time?

A. Yes, sir.

Q. You knew that part of the law?

A. Yes, sir.

Q. Now, when you did sign these requisitions directed to the Collector at Columbia, did you fill them in in the entirety? Did you fill in the whole blank?

A. Those were stamped in as I recall.

Q. Who would stamp them in?

A. It was done by the Collector.

Q. In other words, when you got one of these particular books, and I think you admitted it just a moment ago, you could only get one at a time?

A. Yes, sir.

Q. And they contained ten duplicate originals?

A. They did.

Q. And on each occasion when you procured one of these, did you go to the office of the Collector yourself?

A. I did not.

Q. Did someone go for you?

A. One of these blanks was contained in each book I got, and when it was exhausted I sent it in with ten cents.

Q. So, Doctor, as far as this requisition is concerned, where it says, "I now have on hand blank order forms, serial numbers, etc. issued to me on blank dates," would you fill it in at the time?

A. I think, as a matter of routine, I usually filled in "none", because I didn't send in until I exhausted my supply.

Q. Now, Doctor, for this period of the exhibits in evidence here, that is, for the period, Doctor, from 11-24-37— [fol. 144] well, it would be the date of issuance, 11-5-37 up to and including this last one of January 8th, 1940, a period from November, 1937 until January, 1940, or about thirty months, wasn't it?

A. Give me those figures again.

Q. From November, 1937 until January, 1940 would be all of 1938 and 1939?

A. Nearly 3½ years.

Q. Well, it will speak for itself. It is from November, 1937 until January, 1940. And, Doctor, on those occasions when you sent in you never had any of your applications or requisitions refused by the Collector of this particular district did you?

A. I did not.

Q. None whatsoever, and, of course, you were complying with the law by holding your blanks on file for a period of two years as the law prescribes?

A. I was.

Q. And your records were open to inspection by the Government Agents at any time they wanted to come into your place?

A. They were.

Q. And even though your records were open, on these requisitions you never were refused a book of forms from the Collector of the district, which you say is at Columbia, S. C. Is that correct?

A. Yes, sir.

Q. Now, Doctor, before yesterday, November 10th, 1941, did you ever see Mr. Dotterweich, the gentleman seated at the table in a light suit? Did you ever see him prior to that time?

A. No, sir.

Q. Did you ever see Miss Gertz, the lady seated at his left, prior to that time?

A. No, sir.

[fol. 145] Q. What was the first contact you had with the Direct Sales Company, Inc., in Buffalo, New York?

A. It would be right hard for me to recall, because I have been buying some things from the Direct Sales Company for a long time, quite a number of years.

Q. In other words, in addition to narcotics, you bought other pharmaceuticals?

A. I have.

Q. You knew their business included a great number of pharmaceuticals besides narcotics?

A. I did.

Q. Now, Doctor, you say it is difficult to recollect, but was the first contact you made with the Direct Sales through the medium of writing an order?

A. I couldn't say positively about that at this time, but my first contact with them, I think, was through a catalogue they sent me.

Q. And through the medium of that catalogue, did you purchase something other than narcotics?

A. Yes, sir.

Q. And you had relations with them for a number of years in purchasing something other than narcotics?

A. Yes, sir.

Q. Doctor, in regard to the purchase of narcotics, was your first entree or first approach to the Direct Sales Company through the medium of one of these narcotic blank orders that you had secured from the Collector at Columbia, S. C.?

A. It was.

Q. You knew, Doctor, that according to this Harrison

[fol. 146] Narcotic Act these orders in the first instance were issued by the Collector in duplicate, did you not?

A. I did.

Q. And you knew that in order to secure them, it was necessary for the Collector to stamp your name and registration number and class and address at the time he issued them to you?

A. Yes, sir.

Q. That definitely is put on there by the Collector before you receive such a book of narcotic blank forms?

A. It is.

Q. And after you receive these forms from him, which are ten duplicates or ten blanks or ten duplicate originals, it is then necessary for you to write in the name of the company to which you are sending the original. Is that correct?

A. Yes, sir.

Q. By the way, the duplicate itself has a carbon provided for it?

A. Yes, sir.

Q. So when you write, there is a duplicate original which you retain in the book?

A. Yes, sir.

Q. And, Doctor, the company which you send it to, it is strictly at your election whether you want to put a catalogue number in there or describe the article itself?

A. I thought it was only necessary to describe the article.

Q. You didn't know the number was optional?

A. It was optional.

Q. The order was made out and you sign it at the bottom?

A. That is correct.

[fol. 147] Q. You take the original and send it to the wholesaler or manufacturer from whom you are purchasing?

A. Yes, sir.

Q. You retain the duplicate and when the order comes back to you, the original you send to the manufacturer is retained by him?

A. I presume so.

Q. But you never get it back?

A. No, sir.

The Court:

Q. What becomes of the copy; do you keep that?
A. You mean the duplicate?
Q. Yes.
A. Yes, sir, it stays in the files.

Mr. Mahoney:

Q. The copy you keep and that is part of the books, Government's Exhibit #2. You are required to keep those for a period of two years, are you not?
A. Yes, sir.
Q. You are compelled, also, to grant access to it to the Government inspectors at any time they come in?
A. Yes, sir.
Q. Doctor, you say your first contact with the Direct Sales as to narcotics, that is, the purchase of narcotics from them, was by means of such an order as you have just described. Is that right?
A. Yes, sir.
Q. So you took this blank and filled it out for the quantity you wanted and mailed it to the Direct Sales Company, Inc., [fol. 148] Buffalo, New York. Is that right?
A. Yes, sir.
Q. Did you ever converse with any of the officers of the Direct Sales Company at any time at all?
A. No, I haven't.
Q. You never had a conversation at all with them?
A. No, sir.
Q. You never knew the identity of the individuals connected with the company?
A. I did not.
Q. You never had a telephone conversation with them did you?
A. No, sir.
Q. You never had any communications with them other than that introduced in evidence concerning that return in June, 1940, that has just been put in evidence?
A. That is all.
Q. And that is the only contact you had with the Direct Sales, namely, only through the medium of the order form?
A. Yes, sir.
Q. Now, Doctor, you never have been approached in South Carolina or in any of the other States of the United

States by any representative of the Direct Sales Company in reference to the purchase of morphine or any opium derivative?

A. I never have.

Q. Up to yesterday I don't suppose you ever knew the identity of anyone connected with it?

A. No, sir, I did not.

Q. In fact, you considered it only as a mail order house?

A. Yes, sir.

[fol. 149] Q. Did any information ever pass from you to the Direct Sales Company by letter, telephone, by conversation—that is, conversation by word of mouth where you were that close to the Direct Sales or its officers, wherein you ever told them to whom you were selling to?

A. No, they had no information; none from me whatever.

Q. Did they have any information of the quantities you were selling?

A. You mean——

Q. To individuals.

A. No, they did not.

Q. Did they have any information whatsoever, as you testified yesterday, that you were selling to people not registered?

A. No, I don't suppose they did.

The Court: Selling to people not registered? What do you mean by that.

Mr. Mahoney: Whether the Doctor ever communicated that fact.

The Court: You said, "Selling to people not registered." What do you mean by that?

Mr. Mahoney: He testified yesterday, in answer to a question of the District Attorney, about a sale to Mr. Johnson—maybe I am a little ahead.

The Court: Do you mean people not registered physicians?

Mr. Mahoney: No, sir, not registered under the Act.

The Court: I see, Go ahead.

Mr. Mahoney:

Q. Did you ever communicate with, contact, or inform the Direct Sales Company that you were selling individuals not registered under the Harrison Narcotic Act?

[fol. 150] A. I never did.

Mr. Doyle: If your Honor please, I make this objection, that he has no right to make sale to anyone, registered or unregistered.

The Court: That is why I made the inquiry. What is your purpose in asking that? Is it your contention that this doctor has the right to sell, for instance, to a registered druggist?

Mr. Mahoney: No, your Honor, I never considered, because the druggist situation is not at issue in this lawsuit. I think I must make this statement, and again I apologize to you. It was brought out yesterday that certain individuals to whom Dr. Tate sold were not registered under the Act.

Mr. Doyle: The purpose there was that they had not the right.

Mr. Mahoney: Let me finish my statement.

The Court: Let him finish his statement.

Mr. Mahoney: It developed at the close of the trial yesterday that in order for the District Attorney to prove that these people were not registered, it would be necessary to bring a witness from Columbia, and he and I agreed that it would not be necessary.

The Court: I think your question is proper. You don't have to apologize in this Court for anything, except contempt of Court. It is your duty to represent your client.

Mr. Mahoney:

Q. Did you ever contact the Direct Sales Company by any means, I don't care what it be, that you were selling to [fol. 151] people not registered under the Act?

A. I did not.

Q. Did you ever notify the Direct Sales Company by any means whatsoever that you were selling individuals without prescriptions?

A. No, I did not.

Q. Did you ever communicate with the Direct Sales Company in any manner whatsoever, except to send in the order blank with the amount of the order on it?

A. I did not.

Q. Did the Direct Sales Company, Inc., the defendant, did they receive any money from you for any of these narcotics or opiates whatsoever other than what you remitted to the Postoffice or Postmistress at Calhoun Falls, S. C., which was the amount called for on the article itself?

A. They did not.

Q. Did the Direct Sales Company ever know what you were selling it to others for?

A. No, sir.

Q. Did you have any connection of any kind with the Direct Sales Company at all?

A. None whatever.

Q. Did the Direct Sales Company ever aid you in any respect whatsoever, by any manner or means whatsoever, in effecting sales to Ruby Lamar, Reel B. Black, George C. Johnson, or, anybody else?

A. They did not.

Q. Did they ever get one penny of money from you for any of the money you received from this purchase of dope whatsoever?

[fol. 152] A. They did not.

Q. You are sure of that?

A. Yes, sir.

The Court: Let me ask him a question there.

Q. Did you pay more for the drugs from the Direct Sales Company or less or the same price that you paid other druggists?

Mr. Mahoney: I want to enter an objection, if your Honor please.

The Court: The purpose was in your favor. Don't answer it. I thought it would be in your favor. In other words, what I was trying to bring out was whether they made any unusual profit from him. Do you still want to object to it?

Mr. Mahoney: No, your Honor, with that thought in mind I withdraw the objection.

A. What is the question?

The Court: I said did you pay more for the drugs from the Direct Sales Company, or less or the same price?

A. I paid less. That is my main reason for buying from them, because I could buy from them a little cheaper than I could from other wholesale houses.

Mr. Tinsley: I would like to ask the witness one question.

Cross-examination.

By Mr. Tinsley:

Q. Doctor Tate, did you ever see Clyde Foster, this gentleman on the right, before you came in this court?
A. I don't remember that I have, sir.

[fol. 153] Redirect examination.

By Mr. Doyle:

Q. Now, Doctor, you paid a great deal less than you would pay anybody else?
A. Yes, sir.
Q. Would you say forty per cent?

Mr. Mahoney: I move to strike and ask the District Attorney not to lead.
The Court: Don't lead, Mr. District Attorney. Just ask the question. You can ask him what per cent less. I will rule that competent.

Mr. Doyle:

Q. Would you say what per cent?
A. I would say between thirty and forty per cent less than I usually paid the other wholesalers.
Q. And your volume of business with them, would you say that was a large volume of business or not?

Mr. Mahoney: I object to that, your Honor. That is a conclusion.
The Court: Well, the exhibits in evidence, the order forms, show how large it was or how small it was. They are in evidence and that is the best evidence.

Mr. Doyle:

Q. You say you still have your license?
A. Yes, sir.
Q. Do you know, as a matter of fact, that the Collector has no right to cancel your license?

Mr. Mahoney: I object to that.
The Court: Objection overruled. Exception noted and allowed.

[fol. 154] Mr. Doyle:

Q. The Collector for South Carolina has no right to cancel your license?

A. I don't think he would have unless by order of Court.

Q. During the last few years of your relationship, did you buy anything other than narcotics?

A. How far back do you run that?

Q. About two years.

A. I am not sure, but I think I bought some other things.

Q. Would you say that was a small amount?

A. That was a small amount.

Q. It was almost entirely narcotics?

A. Almost entirely narcotics.

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Recross-examination.

By Mr. Mahoney:

Q. You say that you bought it at thirty to forty per cent less than you usually paid other wholesalers. I take it that you refer to Lilly?

A. I had bought it from local wholesale dealers and not manufacturers.

Q. You say local dealers. One is the Hodges Drug Company?

A. The Hodges Drug Company and the Direct Sales Company, I think, are the only ones I purchased from in the last few years.

Q. The records, Government's Exhibit #2, show that the only other purchases you made was from the Hodges Drug Company.

A. Well, I say I think that is about all.

Q. You say they are local wholesalers?

A. I think their license is as a wholesale druggist. At least they can fill these order forms.

[fol. 155] Q. I notice from the exhibit that the Hodges Drug Company was designated and I see that the Hodges Drug Company is in this City?

A. Yes, sir.

Q. The only other person you have bought from since 1937 was the Hodges Drug Company?

A. I think that is correct.

Q. Prior to 1937, did you buy from any other?
A. I think the Murray Drug Company in Columbia.
Q. Other than the Murray Drug Company there are none?

The Court: What about the Geer Drug Company?

A. The Geer Drug Company.

Mr. Mahoney:

Q. The drug companies you have designated are the Murray Drug Company, the Geer Drug Company, and the Hodges Drug Company?
A. Yes, sir.

The Court:

Q. They are not mail order houses are they, Doctor?
A. No, sir.
Q. They have traveling men who solicit orders from drug-stores and doctors?

Mr. Mahoney: They do have them, your Honor.

Q. You have heard of the Lilly Drug Company?
A. Yes, sir.
Q. You have heard of Merck?
A. Yes, sir.
Q. And I take it you have heard of some other substantial ones throughout the country?
A. Yes, sir
[fol. 156] Q. Now, they are not mail order houses?
A. No, sir.
Q. They have soiicitors that come around?
A. Yes, sir.
Q. And you testify that there are no solicitors from the Direct Sales Company that come around?
A. No, sir.
Q. You do know they are a mail order house?
A. Yes, sir.
Q. And the fact that they are a mail order house, they are in position of giving you that discount?
A. I think they should be.
Q. And the fact that they are a mail order house accounts for the reason that they are able to afford to give you that liberal discount?
A. Yes, sir.

Witness leaves stand.

* * * * * * *

[fol. 157] JOSEPH M. BRANSKY, a witness produced on behalf of the United States, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Poyle:

Q. Mr. Bransky, what is your occupation?

A. I am a Federal narcotic agent of the Treasury Department, Narcotic Bureau.

Q. What district are you now assigned to work?

A. I am assigned to District Number 6 with headquarters in Atlanta.

Q. Does that include South Carolina?

A. Yes, sir.

Q. Mr. Bransky, how long have you been an inspector?

A. Approximately about 24 years.

Q. Prior to that time had you had any experience or education in pharmacy?

A. Yes, sir.

Q. What were your educational qualifications?

A. I am a graduate of the University of Maryland College of Pharmacy with the degree of Doctor of Pharmacy.

Q. After that did you have experience in practicing pharmacy?

A. Well, I had been associated with a retail drug company since I was 19 years of age.

Q. What is the standard that physicians go by in reference to the dosage of medicines?

A. The United States Pharmacopeia.

Q. Is it a recognized authority?

A. Yes, sir.

Q. I show you Volume 10 of that work, and here is Volume 11, Pharmacopeia of the United States. Look under mor-

[fol. 158] phine and tell us what the standar- dosage, as given by that recognized standard work, is (handing books to witness).

Mr. Mahoney: Your Honor, I object on the ground that it is incompetent, irrelevant and immaterial, and I would respectfully call your Honor's attention, in ruling on this particular evidence, (and I am going to move to strike Dr. Ham's testimony) to the case of Heller vs. United States which was tried before yourself. The Circuit Court,

in determining a question raised in that case as one of the alleged errors committed by the Trial Court——

The Court: Alleged error is right.

Mr. Mahoney: Yes, sir, that is true. They claimed that the hypothetical testimony of the doctor was incompetent because it contained facts introduced in that case I think the witness was suffering from amoebic dysentery. The Court held that the testimony was perfectly proper because of the fact that that testimony was there, whereas they held it would not be competent on the part of the doctor if that testimony was not in the case. In our situation we have nothing of that kind.

The Court: Read what the Court said in that case.

Mr. Mahoney: I am now reading from the case of Heller vs. United States, 104 F. (2d) 447. "And it was of course no valid objection that the facts upon which the question was hypothecated had been testified to by witnesses in the cause. The question would not ordinarily have been competent otherwise."

The Court: What was the question?

Mr. Mahoney: The question was whether or not for this [fol. 159] individual Pike, who had traveled from Winston-Salem to Greenville, a distance of 180 miles, every weekend for the purpose of getting these prescriptions, whether or not the dosage in the prescriptions was proper for the treatment of what the doctor claimed was incurable chronic angina and chronic Amoebic dysentery. Now, that was the issue involved in that case and counsel for the defendant claimed that in that case it was not competent because the hypothetical question was based on the facts in the case.

Mr. Mahoney further argues to the Court on objection.

Mr. Doyle argues.

The Court: Mr. Mahoney, how do you contend that this is a hypothetical question when he asks the question what is the standard dose of medicine? How is that a hypothetical question?

Mr. Mahoney: This is giving his expert opinion.

The Court: Even if it is, it is just standard doses. Another thing, Mr. District Attorney, he has not made it a ground for objection, but our Supreme Court has held that the books of authors are hearsay testimony. He has no opportunity to cross-examine.

Mr. Doyle: Yes, sir, but he has an opportunity to cross examine the witness.

The Court: Our Supreme Court has held that the books of authors are hearsay evidence because the Constitution of the United States gives every defendant the opportunity to cross-examine any witness he is confronted with.

Mr. Doyle: Your Honor has seen many books introduced.

The Court: I have seen them introduced and I have [fol. 160] introduced them, but I think in a case in which the opinion was written by Chief Justice Bonham, our Supreme Court held that the introducing of medical books by prominent doctors deprived a defendant of his Constitutional rights. That was a civil case, but it would be more so in a criminal case. Now, I will give you until tomorrow to find me some authority that it is not hearsay evidence. In the meantime I will sustain the objection on that ground. I don't think it is a hypothetical question, but I will sustain it on the other ground.

Mr. Doyle: He is a doctor of pharmacy.

The Court: You had better qualify him.

Mr. Doyle:

Q. You say you are a graduate of the University of Maryland?

A. Yes, sir.

Q. Is that a good school?

A. It is a recognized college of pharmacy.

Q. Preparatory to taking that course, what prior education had you had?

A. A high school education for four years, two years at law school, and then I studied pharmacy. I went to work in a drugstore when I was nineteen years of age and continued to work in the drugstore all the time I was receiving my education and until I entered college in Baltimore.

Q. How long did you have experience in a drugstore?

A. I should say from about 1909 to 1917, because I passed the State Board as assistant pharmacist before I took the Board. After I graduated from the school, I passed the State Board as a registered pharmacist in the State of Maryland.

[fol. 161] Q. You got your degree?

A. Yes, sir, as a doctor of pharmacy.

The Court:

Q. Did you fill prescriptions for doctors?

A. Thousands of them.

Q. Where they prescribed morphine?
A. Yes, sir.

The Court: All right, ask the question.

Mr. Doyle:

Q. Now, Mr. Bransky, from your own professional education and pharmaceutical experience, what do you say is the standard dose of morphine sulphate?

Mr. Mahoney: I object on the ground that it is incompetent, irrelevant and immaterial.
The Court: Objection overruled. Exception taken and allowed.

A. An eighth to a quarter of a grain.

Mr. Doyle:

Q. Is morphine the treatment for anything?

Mr. Mahoney: I object to that, your Honor. It is incompetent.
The Court: Well, I don't think he would qualify as a doctor.

Mr. Doyle:

Q. For the alleviation of pain, Doctor, from your experience that we have outlined, what is more often used than morphine for the alleviation of pain?

Mr. Mahoney: I object to that.
The Court: I think you better get a doctor. A lot of [fol. 162] druggists prescribe for people, but you better have a doctor.

Mr. Doyle:

Q. All right, Mr. Bransky, were you even sent to Buffalo, New York, to the offices of the Direct Sales Company?
A. Yes, sir.
Q. Who sent you there?

Mr. Mahoney: I object to that. It is incompetent.

Mr. Doyle:

Q. Did anyone send you there?
A. Yes, sir.

Q. Who?

A. The Commissioner of Narcotics, Washington, D. C.

Q. What date was that?

A. It was in August, 1936.

Q. All right, sir, was that the first time you had ever been there?

A. Yes, sir.

Q. Now, then, when you got there did you see any officer of the Direct Sales Company?

A. I went to the plant of the Direct Sales Company on the morning of August 12th, 1936, in company with Agent R. W. Artis, and I interviewed Mr. Joseph H. Dotterweich, who told me he was president of the Direct Sales Company.

Q. The president of the company now is Mr. George J. Dotterweich. I believe it is admitted. Now, was Mr. George J. Dotterweich an officer of the company at the time you went there?

A. Yes, sir.

[fol. 163] Q. All right, was he present when you got there?

A. No, sir, I was informed that he was in Germany visiting some relatives.

Q. Did you later see him?

A. Yes, sir.

Q. How long after your first arrival there before you were able to talk to him?

A. He returned about August 19th and I spoke to him about that time, and later I had conversations with him about August 24th, 1936.

Q. Mr. Bransky, when you had a conference with him and his brother, both being officers of the company, did you explain to them your mission?

A. Yes, sir.

Q. What explanation did you ~~give~~ them?

A. I advised both Mr. Joseph H. Dotterweich, who was then president, and Mr. George Dotterweich, who was chairman of the board, that I had been directed to come to the plant by the ~~C~~ommissioner of Narcotics of Washington, D. C.

Mr. Mahoney: I object to anything the Commissioner may have said to this man and any purpose for which he may have come to the company.

The Court: Well, he is detailing a conversation between himself and one of the officers of the company. Why isn't that competent?

Mr. Mahoney: Yes, sir, but he is giving a statement of the Commissioner of Narcotics, at Washington, D. C. We are not bound by that whatsoever, instructions given by the Commissioner at Washington, D. C. to Mr. Bransky in [fol. 164] the service.

The Court: What do you say, Mr. Doyle?

Mr. Doyle: This gentleman is talking to officers of the company and he is explaining why he was there, and his conversation is relating to the subject of why he went there.

The Court: I think any conversation between him and the officers of the company would be competent.

Mr. Mahoney: Exception taken.

The Court: Exception taken and allowed. Go ahead.

Mr. Doyle:

Q. Go ahead.

A. I told Mr. Joseph Dotterweich and Mr. George Dotterweich that I was there due to large quantities of drugs which they had been selling to various registrants throughout the United States which had been diverted, and I asked their cooperation to curb this. They told me they didn't desire any test case of the matter. Both of the two brothers stated to me, "Mr. Bransky, we only sell these narcotic drugs on order forms that are submitted by registrants," who in their opinion were registered under the narcotic law and they had no way of knowing what disposition was being made of these drugs by the registrants. I said to the two gentlemen that my experience as an officer of the Narcotic Bureau had taught me that when a physician ordered half-grain tablets of morphine sulphate, it could be assumed that they were being dispensed to satisfy addiction in violation of the narcotic law and were being used for other than legitimate medical purposes. I also told them that it had been my experience over a long period of time as an investigative officer that the average [fol. 165] physician over the United States would purchase from 200 to 400 quarter-grains hypodermic tablets of morphine sulphate in about a year. I remained in the plant for a period off and on of about six weeks and the

first day I arrived I gave to Mr. Joseph H. Dotterweich, who was then president of the company, a list of registrants who had been convicted, as I told him and which the letter also stated, a copy of which I had, for flagrant violations of the Federal Narcotic Law, as amended.

Q. Right there, Mr. Bransky, if I may interrupt you a moment, have you that list before you and the letter which you had?

A. A copy of the letter.

Q. But it is your duplicate original?

A. It is a letter that I personally prepared and this is the carbon copy.

Q. Heretofore, in some motions prior to the trial, that has been referred to as the black list.

A. Yes, sir.

Q. Let me see it just a minute, sir. All right, sir. Now, you prepared this list of names. You say registrants. Are all those registrants in Class 4, that is, physicians?

A. These are physicians; practitioners.

Q. Now, you prepared that list. Now, explain to the jury how they got on that list. What one thing put them on the list?

Mr. Mahoney: I object to that, your Honor, on the ground that it is incompetent, irrelevant and immaterial, and on the ground that you cannot introduce in evidence here the evidence in those respective cases.

The Court: What is the purpose of the question?

[fol. 166] Mr. Doyle: Well, sir, it is part of the conversation with these two officers.

The Court: He is talking about the other cases. I think the objection should be sustained on that ground. He can state what he told these two officers.

Mr. Doyle:

Q. What did you tell them?

A. I told them that it was a list of 204 names of those who had been convicted of violations of the Federal Narcotic Law, as amended.

Q. Did you then submit to them that list?

A. Yes, sir, I submitted the original.

Q. Did you call their attention to the facts in connection with it?

A. Yes, sir.

Q. What?

A. I asked permission of Mr. Joseph H. Dotterweich, then the president, to make an investigation of their records to ascertain the number of their customers, to ascertain the names of their customers who appeared on this list of 204 names that I had spoken to them about, and submitted the original letter to them.

Q. Did you get his permission to do so?

A. Yes, sir, he assigned Miss Carrie Hyatt, then in charge of the office, to assist me.

Q. Then did you have a conversation with them and call their attention to any facts?

A. Yes, sir, I told Mr. Joseph H. Dotterweich that 55 of the 204 physicians had accounts with the Direct Sales Company.

[fol. 167] Q. Does or not that list contain all the names of registrants who had been convicted in the United States at that time?

A. Yes, sir.

Q. And you told him 55 were their customers?

A. Yes, sir.

Q. What per cent. is that?

A. .2696.

Q. Now, Mr. Bransky, does the Commissioner of Narcotics, since the beginning of that, furnish a similar list to all wholesale manufacturers and people who deal in these drugs?

A. Yes, sir.

Q. Is it from time to time revised?

A. Yes, sir.

Q. How often is it revised?

A. I couldn't say, Mr. Doyle.

Q. Now, the letter accompanying that list, do you have it there?

A. Yes, sir.

Mr. Doyle: I would like to introduce it in evidence.

A. I would like to explain those inkmarks on there if permitted to, so counsel will understand them.

Mr. Mahoney inspects list.

Mr. Mahoney: No objection, Mr. Doyle.

Letter from Joseph M. Bransky, Narcotic Agent, Special Detail, to Mr. Joseph H. Dotterweich, President, Direct

Sales Company, dated August 12, 1936, containing a list of names of 204 physicians, hereinabove identified and referred to, is admitted in evidence as Government's Exhibit #5.

Mr. Doyle: I am not going to read the list of names, but I will read the letter.

Mr. Doyle publishes letter to jury.

[fol. 168] Mr. Doyle:

Q. All right, sir, after delivering that letter and calling their attention to these matters that you have spoken of, what if anything did they say or did you say further in that conversation?

A. They told me at that time that they would cooperate and not send those drugs to those registrants named on that black list.

Q. At a little later date, did you add a supplement to that list?

A. Yes, sir, from time to time I added supplements and gave them the originals of the letters.

Q. Have you the supplement that sometime after August you submitted?

A. Yes, sir, I have one in August.

Mr. Doyle submits paper to Mr. Mahoney.

Mr. Mahoney: No objection, Mr. Doyle.

Mr. Doyle: I wish to offer this in evidence.

Letter from Joseph M. Bransky, Narcotic Agent, Special Detail, to Joseph H. Dotterweich, President, Direct Sales Company, dated August 21, 1936, hereinabove identified and referred to, is admitted in evidence as Government's Exhibit #6.

Mr. Doyle publishes exhibit to jury.

Mr. Doyle:

Q. Now, Mr. Bransky, I believe that does end your conversation respecting that list?

A. Yes, sir.

Q. Now, did you get catalogues of the company while you were there and since?

A. Yes, sir.

[fol. 169] Q. May I see some of them, please?

A. (Witness hands pamphlets to Mr. Doyle.)

Q. Are there any others in the folder form that you have?

A. Not at that time.

Q. Have you received others since in that form?

A. Yes, sir, not from them, but I have catalogues of the Direct Sales Company.

Q. Did you have conversations with these officers of the company about the catalogue?

A. Yes, sir.

Q. What did you direct their attention to and what was your comments about the catalogue?

A. About September 18th, 1936, I returned to the Direct Sales Company plant after a survey of some surrounding cities, and I spoke to Mr. George Dotterweich. I told Mr. Dotterweich that from the examination of catalogues of various drug houses, some of them Sharpe & Dohme, Eli Lilly, and Parke-Davis, that they only listed morphine sulphate in quantities not to exceed 100 and I called his attention to the fact that the Direct Sales Company had been listing 500, 1,000 and 5,000.

Q. Quantity lots?

A. Yes, sir, and Mr. George Dotterweich said to me, "Oh, I know that," and I said, "I just want you to be aware of that fact." Later on, before I proceeded back to my post of duty, the Direct Sales Company stopped quoting in 5,000 lots and quoted in 500 and a thousand lots.

Q. Are they still quoted in their catalogues?

A. Yes, sir.

Q. Are they put up in twenties, fifties and hundreds, or [fol. 170] twenties and hundreds?

Mr. Mahoney: I object to that as incompetent, irrelevant and immaterial.

The Court: The catalogue is the best evidence.

Mr. Doyle:

Q. Well, did you have a conversation about amounts less than 500?

Mr. Mahoney: I object to it. He has already testified to it.

Mr. Doyle:

Q. Mr. Bransky, were you there when Mr. Joseph Dotterweich severed his relations with the company?

A. Yes, sir.

Q. And when did Mr. George Dotterweich become president?

A. I don't know, sir, but Mr. Joseph Dotterweich severed his relations with the company on September 1st, 1936. I was given a letter signed by Mr George Dotterweich to that effect.

Q. And so far as you know, has he been the head of the company since that time?

A. Yes, sir.

* * * * * * *

After instructing the jury, the Court announces a recess until ten o'clock tomorrow morning.

* * * * * * *

The trial is resumed at ten o'clock, a. m. November 12, 1941.

Direct examination continued.

By Mr. Doyle:

Q. Mr. Bransky, we will resume where we left off yesterday.

Mr. Doyle: I offer these catalogues in evidence.

[fol. 171] Catalogue of Direct Sales Company, Inc., headed "Net Price List No. 89" is admitted in evidence as Government's Exhibit #7.

Catalogue of Direct Sales Company, Inc., headed "Net Price List No. 90", is admitted in evidence as Government's Exhibit #8.

Page 20 from a catalogue of Direct Sales Company, Inc., is admitted in evidence as Government's Exhibit No. 9.

An unnumbered page from a catalouge of Direct Sales Company, Inc., is admitted in evidence as Government's Exhibit #10.

Q. Now, when you were in Buffalo and saw one of these catalogues, what was the manner of listing morphine sulphate in one of those catalogues?

Mr. Mahoney: I object. The best evidence is the catalogues introduced.

Mr. Doyle: Of course it is, but I just thought I could save time.

Q. Is that one of them? (Handing paper to witness.)
A. Yes, sir.
Q. You can see what it is and tell us what that listing is.

Mr. Mahoney: What exhibit is that?

A. Exhibit 9. Five hundred, one thousand, and five thousand.

Mr. Doyle:

Q. Now, did you have a conversation with Mr. George Dotterweich with respect to that listing?
A. Yes, sir.

The Court:

Q. Five hundred, one thousand, and five thousand what?
A. Morphine sulphate quarter grains and half-grains, and various other strengths.
[fol. 172] Mr. Doyle.

Q. Go ahead.

A. I told Mr. George Dotterweich that the Direct Sales Company was the only manufacturer I knew that listed hypodermic tablets of morphine sulphate in 5000 quantities, and that Sharpe & Dohme, Parke-Davis, and other houses listed them in twenties and hundreds.
Q. Then, Mr. Bransky, did you have a conversation with Mr. Dotterweich with respect to the size of the orders on the order forms registered in Class 4?
A. Yes, sir.
Q. What was that?
A. We asked Mr. Dotterweich's cooperation and asked him to limit the sale of hypodermic tablets of morphine sulphate to 1000 half-grain tablets to each order form.
Q. Did he agree to that?
A. Yes, sir.
Q. Did you have any authority by law or regulation to compel them to do anything either about the catalogue or the size of the orders?
A. No, sir. I asked him that in the spirit of cooperation to *to* control large quantities of drugs that were going into illicit traffic.
Q. The listings in the catalogues subsequent to that agreement were what? That is one of them and since you have

better eyes than I, see what that was. (Handing pamphlet to witness.)

A. The listing became 500 and 1000 tablets of hypodermic morphine sulphate.

Q. Nothing less than 500?

[fol. 173] A. No, sir.

Mr. Mahoney: I object to that last as calling for a conclusion. If he means the exhibit, it is true, but I don't want the impression conveyed that we would not sell in lots less than 500.

The Court:

Q. What does the exhibit show?

A. The exhibit shows 500 and 1000.

Mr. Doyle:

Q. Now, Mr. Bransky, did you have any conversation with Mr. George Dotterweich with respect to the amount of morphine sulphate that his firm was purchasing?

A. Yes, sir.

Q. Now, a firm such as his, a wholesaler and a manufacturer, what is necessary for him to get morphine in any type or form?

A. It is necessary for him to register and obtain a license in the district where he does business and order on the same form as his jobber does. He presents the order forms for his jobber.

Q. What conversation did you have with him about his purchases?

Mr. Mahoney: I object on the ground that it is incompetent, irrelevant and immaterial. We must keep in mind that this indictment is against the individuals designated.

The Court: Objection overruled.

Mr. Mahoney: Exception taken.

The Court: Exception allowed.

Mr. Doyle:

Q. What was it?

[fol. 174] A. I noticed an order form made out to the Mallencrodt Company.

The Court: He asked you about a conversation.

A. I spoke to Mr. George Dotterweich about an order form made out to the Mallencrodt Company for 5,000 ounces of morphine. An examination of their stock——

Mr. Mahoney: I object to that. It is not responsive.

The Court: Objection sustained.

A. I asked Mr. Dotterweich where this large quantity of drug was and Mr. Dotterweich told me that they made a contract with the Mallencrodt Company for 5,000 ounces of morphine at the time due to the fact that they could get a good price in quantity, and that they withdrew the morphine sulphate in quantities that they needed for the manufacture of preparations containing narcotic drugs.

Mr. Mahoney: Now, Your Honor, I renew the objection on the ground that it is incompetent and irrelevant in this particular matter as not bearing on the issue involved as to the alleged conspiracy for the purpose of defrauding the United States out of its taxes.

Mr. Mahoney and Mr. Doyle argue to the Court.

The Court: Well, the Circuit Court of Appeals has held in these cases that the Government is allowed a very wide latitude to prove discounted circumstances. I will admit it for whatever it may be worth just as a circumstance.

Mr. Mahoney: Exception requested.

The Court: Exception allowed. Your motion is to strike?

Mr. Mahoney: Yes, sir.

The Court: Motion overruled and exception taken and allowed.

[fol. 175] Cross-examination.

By Mr. Mahoney:

Q. Mr. Bransky, in testifying this morning you said that sometime between August 12th and September 16th, 1936, in a conversation with Mr. George J. Dotterweich relative to Government's Exhibit No. 10, that you called his attention to the fact that a particular page of their catalogue which set forth narcotic preparations, set forth the lots in the amounts of 500, 1000 and 5000, and immediately thereunder designated the price of the same. Is that right?

A. I testified as to Exhibit 9 instead of 10.

Q. Number 9. That is what I mean. You testified here this morning that you called to the attention of Mr. Dotter-

weich that this particular page of the catalogue, that is, Government's Exhibit #9, was set up in items of 500, 1000 and 5000?

A. That is correct.

Q. And you testified that the Direct Sales Company would sell in those particular quantities?

A. Yes, sir.

Q. Now, you did not mean to convey to the Court and jury that in that conversation it was stated to you that the Direct Sales would not sell in lots less than 500?

A. No, sir, I did not.

Q. Did you have any conversation along that line with Mr. George Dotterweich?

A. Yes, sir.

Q. And you found out not only from your examination but from order blanks in the office that there were sales in lots less than 500?

[fol. 176] A. That is correct, sir.

Q. Now, after showing him this extract from Page 20, this Government's Exhibit #9, you suggested that the 5,000 be eliminated did you not? That was the reason for the conversation and the purpose behind it was that there be a curtailment in the lot of 5,000 and the price for it. Is that correct?

A. Yes, sir.

Q. And as a result of your conversation with Mr. George Dotterweich, this new catalogue was prepared and as far as Page 20 was concerned, or at least as far as the narcotic preparations were concerned, the 5,000 item as to narcotics was eliminated, was it not?

A. Yes, sir.

Q. The 5,000 lots on non-narcotics that were carried on mixtures, solutions, extracts, elixirs, etc., the 5,000 lot was retained, was it not?

A. I don't know, sir.

Q. I just ask you to look at Government's Exhibit #10 and I show you this left-hand column. The 5,000 was retained, was it not? (Showing paper to witness.)

A. That is correct.

Q. You notice in this column that it comes down a good way?

A. Yes, sir.

Q. And in the narcotic preparations, which sets out eight items and only eight, the 5,000 lot was eliminated?

A. That is correct.

Q. And in setting out elixirs, am-onia, bromides and so on, the 5,000 was carried on, was it not?

[fol. 177] A. Of course, that was sold in liquid, so it couldn't apply to that.

Q. But you notice 5,000 lots?

A. Yes, but they don't sell 5,000 gallons of that. The 5,000 applies to tablets and this is gallons.

Q. All right, take a look over here. Would you say they are liquids? (indicating)

A. No, sir, that is compressed tablets.

Q. What I mean is this. From this exhibit as far as compressed tablets handled by the Direct Sales Company were concerned, which were non-narcotics, the 5,000 lot was retained in the catalogue, wasn't it?

A. Yes, sir, that is correct.

Q. And pursuant to your suggestion to Mr. Dotterweich, the 5,000 lot as to narcotics was eliminated was it not?

A That is correct.

Q. And as far as your suggestion to Mr. Dotterweich to eliminate the sale of 5,000 lots, you found that the Direct Sales cooperated with you to the extent of eliminating that according to your suggestion?

A. That is correct.

Q. And to do that the catalogue and the sheet on which it appears had to be reprinted?

A. Yes, sir.

Q. And you appreciate that that was additional expense to do that?

A. Yes, sir, for the price of those catalogues.

Q. Now, you have also testified here this morning, Mr. Bransky, that you asked for cooperation from Mr. George [fol. 178] Dotterweich, whom you knew to be an officer of the corporation, and you were assured that you would have it. Is that right?

A. That is correct, sir.

Q. And you testified this morning that you asked him to limit the sales of morphine sulphate to 1000 hypodermic tablets to each order form. Is that right?

A. That is correct.

Q. That is what you asked him?

A. Yes, sir.

Q. And you were assured that your request in that particular respect would be complied with?

A. Yes, sir.

Q. And, of course, you were checking these orders of the Direct Sales, were you not?

A. Yes, sir.

Q. When you came to the Direct Sales in 1936, Mr. Joseph Dotterweich was president, was he not?

A. Yes, sir.

Q. And as you testified yesterday, he resigned and left the corporation on September 1st, 1936?

A. Yes, sir.

Q. And on September 1st, 1936, you were still at the Direct Sales Company conducting the investigation?

A. Yes, sir.

Q. Of course, your investigation at that time carried you into the plant and out of the plant?

A. Yes, sir.

Q. You were at Rochester and in other places in the [fol. 179] western district of New York?

A. Yes, sir.

Q. At all times pursuing your business as an inspector, looking into other companies doing business of this kind?

A. That is correct.

Q. What I mean, you were not in the Direct Sales Company every day of the week?

A. That is correct.

Q. Isn't it a fact that you were assigned a desk in their office on the first floor?

A. That is correct.

Q. You were also offered the use of a typewriter?

A. Yes, sir, that is correct.

Q. You are a typist, yourself?

A. No, sir.

Q. I mean you can use it and do typing?

A. Yes, sir.

Q. And you were offered a typewriter from the company.

A. Yes, sir.

Q. And during your stay from August, 1936, to the latter part of September, the employees and Miss Hyatt, who

was in the office of the company, cooperated with you all the time?

A. Yes, sir.

Q. While you were there you asked for the narcotic orders that had been received by the Direct Sales Company from January 1st, 1936, for the first six months of that year up to and including June 30th, 1936?

A. There is a possibility that I did.

Q. You wouldn't deny it?

[fol. 180] A. No, sir, I wouldn't deny it.

Q. You know that those orders were produced for you and that you did make an examination?

A. Yes, sir.

Q. And you examined during this particular period of time a multitude of narcotic orders?

A. That is correct.

Q. When you examined them, you looked at the date, of course?

A. Yes, sir.

Q. I mean that as an inspector of the Narcotic Bureau, you are familiar with these particular order blanks that the doctors buy from the Collectors of Internal Revenue?

A. Yes, sir.

Q. And you are also familiar with the blanks that wholesalers execute and deliver to manufacturers and importers for drugs?

A. Yes, sir.

Q. So when you inspected these, you would take a look at the date and number?

A. Yes, sir.

Q. They are all stamped?

A. Yes, sir.

Q. In addition, you would look at the stenciling placed on them?

A. The name of the registrant.

Q. And, of course, that name is either stamped or printed by the Collector of Internal Revenue who issues it?

A. Yes, sir.

Q. Showing you this exhibit of the Government, this part which says, "J. V. Tate, M. C., Reg. No. 1378, Cl. 4, District [fol. 181] of South Carolina, issued 11-5-37 by R. M. Cooper, Collector," that you know is placed on there at the time the

Collector of Internal Revenue delivers this particular order blank to the applicant?

A. That is correct.

Q. And you know that before it is issued, the burden rests upon the Collector to whom the application is made or the requisition is made by the applicant that he must check to ascertain that the application is duly made and that the applicant is duly registered pursuant to the Act, and that he is qualified to receive this book of order blanks. Is that right?

A. Yes, sir.

Q. Now, while you were checking down there, of course you didn't have any intent or motive or anything on your part to skip any doctors they may have sold from January 1st to June 30th, 1936.

A. No, sir.

Q. You were there to make a thorough investigation. Is that right?

A. Yes, sir.

Q. And prior to the time you went there, did you have a list of your own that the Government, that is, whoever your superior was—was it Mr. Anslinger at that time?

A. He was my Commissioner, but my immediate superior was a subordinate of his.

Q. At that time had Mr. Anslinger, or your immediate superior, or you yourself, had you made up a list of individuals, as you stated yesterday, that had been convicted as violators of the Harrison Narcotic Act?

[fol. 182] A. That list was handed me by the Commissioner of Narcotics.

Q. Is that Mr. Anslinger?

A. Yes, sir.

Q. That list was given you sometime prior to August, 1936, when you came into Buffalo. Is that right?

A. That is correct?

Q. The list you gave the Direct Sales Company on August 12th, 1936, which was introduced in evidence yesterday, did that contain a list of all the doctors that Commissioner Anslinger had given you prior to August 12th, 1936?

A. Yes, sir.

Q. This contained a list of all of them, didn't it?

A. Yes, sir.

Q. And, of course, it was made out alphabetically, was it not?

A. Yes, sir.

Q. I will just bring you down to the T's. That starts with Terwilliger and ends with Treon. Was Dr. Tate's name on there?

A. No, sir.

Q. So Dr. Tate at that time was not placed on this—I suppose for convenience we can call it a black list?

A. No, sir.

Q. Did I understand you to say that you had a conversation with Mr. Dotterweich to the effect that any physician ordering any amount in excess of from 200 to 400 grains of morphine sulphate a year, that it had been your experience that he had been purchasing for illegitimate practice?

A. Yes, sir, that it was in excess of the legitimate practice of his profession. I said quarter-grains.

Q. You said that any physician purchasing more than 200 [fol. 183] to 400 quarter-grains of morphine sulphate over the period of a year was purchasing in excess of the legitimate practice of his profession as a doctor?

A. Let me qualify that.

Q. Did you say that?

A. I may have said that, but I would like to qualify that.

Q. If you said it yesterday without qualification, were you in error?

The Court: I think he would have the right to state that.

A. From the quantity indicated, it would be reasonable to assume——

Mr. Mahoney: I object to that.

The Court: Don't consider that, Gentlemen of the Jury. If you want to qualify him, you may do so. I don't think you could draw the conclusion that if a man did so and so it would be reasonable to assume. The reason I admitted it yesterday was because it was in a conversation with Mr. Dotterweich.

Mr. Doyle: Now, I understand that he told Mr. Dotterweich that it was reasonable to assume what he told him.

Mr. Mahoney: If he is merely repeating the conversation of what he told him, without modification of the amount, it it only repetitious.

The Court: You asked if he said that yesterday, and he has the right to say whether he made that statement.

A. It is reasonable to assume that a doctor who is ordering that amount may be violating the provisions of the narcotic law.

[fol. 184] Mr. Mahoney:

Q. That is your recollection?

The Court: That is your recollection of what you said yesterday you told him?

A. Yes, sir.

The Court: All right, I think that would be competent.

Mr. Mahoney:

Q. I show you an original order form from Dr. Tate, taken from the files of the Direct Sales Company, dated 1-6-36. Do you see that? (Showing to witness.)

A. Yes, sir.

Q. That is for 8—100 half-grains morphine sulphate. Is that right?

A. Yes, sir. It just says morphine, but no doubt it means morphine sulphate.

Q. That is for 8—100 half-grains?

A. Yes, sir.

Q. I show you this order form from Dr. Tate dated January 25th, 1936?

A. That is correct, sir.

Q. I show you it is for 5—100 half-grains?

A. That is correct.

Q. These are all half-grains, so there will be no variance. If there is, I will designate it. I show you this one of February 8th, 1936 from Dr. Tate, for 800.

A. Yes, sir.

Q. I show you this one dated March 7th, 1936, for 600.

A. That's correct, sir.

Q. March 23rd, 1936, for 600.

[fol. 185] A. That is correct.

Q. April 6th, 1936, for 800?

A. That is correct.

Q. May 8th, 1936 for 1000?

A. That is correct.

Q. May 30th, 1936 for 800?

A. That is correct.

Q. June 19th, 1936 for 800?

A. That is correct.

Q. Now, you notice that those fall within, they are from January 6th, 1936 to June 19th, 1936?

A. That is correct.

Q. And they are all Dr. Tate's orders?

A. That is correct.

Q. Would you total these for me, please?

A. Yes, sir, I will be glad to. 5900 half-grains.

Q. There is another one.

A. 6700.

Q. In that first six months period there was 6700 half-grain morphine sulphate tablets. Is that correct?

A. Yes, sir, that is correct.

Q. And those were part of the records that you checked in 1936?

A. That is correct, sir.

Mr. Mahoney: I would like to make this for identification.

The Court: Any objections?

Mr. Doyle: I would like to offer it as a Government exhibit.

The Court: Well, he has the right to offer it as an exhibit. [fol. 186] Mr. Mahoney: I will, if there is no objection.

Original order forms from Dr. J. V. Tate to Direct Sales Company, Inc., being the 9 order forms hereinable identified and referred to, are admitted in evidence as Defendants' Exhibit #4.

Q. Also, Mr. Bransky, while in Buffalo sometime between August 12th, 1936 and September 18th, 1936, you requested the Direct Sales Company that while you were there that all narcotic orders that they received from any doctors in the course of their business should be set aside on your desk so you could examine them. Is that right?

A. That is correct.

Q. So during that period each morning Miss Hyatt, who was in the office and assigned to cooperate with you, she took whatever orders the Direct Sales Company received and she put the orders on your desk for inspection?

A. During the days I was in the plant, [illegible]

Q. And the understanding was that those should pass through your inspection and under your scrutiny, and you

were going to determine the advisability of filling such orders by the Direct Sales Company?

A. No, sir. I wasn't going to do that.

Q. For what purpose did you inspect them?

A. I wanted to see what quantities were being purchased by the various registrants.

Q. And if something came through that didn't meet with your approval as complying with various aspects of the law——

A. I was going to call their attention to it.

Q. And during that particular period of time, do you [fol. 187] remember that on or about August 20th and September 4th, 1936, that these two orders came to the Direct Sales Company from Dr. Tate of Calhoun Falls, South Carolina?

A. If I was in the plant the day those orders came in, then I saw those orders, and if I wasn't I didn't see them.

Q. Wil you swear that you didn't see these orders while in the plant, dated August 18th, 1936 and September 4th, 1936, from Dr. Tate, directed to the Direct Sales Company, Inc.?

A. I wouldn't swear that I didn't see them.

Q. And you do reiterate that during this particular time these orders being received were being put on your desk for inspection. Is that right?

A. Yes, sir, that is correct.

Q. I show you these two orders dated August 18th, 1936 and September 4th, 1936, and you note that both are from J. V. Tate, M. D., Calhoun Falls, C. C., Reg. No. 1378, Class 4, District of South Carolina. Is that right?

A. Yes, sir.

Q. You will notice that the order is directed to the Direct Sales Company, Inc., Buffalo, New York, and signed by Dr. J. V. Tate, are they not?

A. That is correct.

Q. And you notice that the one of August 18th, 1936 calls for 600 half-grains?

A. Yes, sir.

Q. And the one of September 4th calls for 800?

A. That is correct.

Q. That is 1400, the aggregate of these two orders?

A. That is correct.

[fol. 188] Q. That is 1400 half-grain morphine sulphate tablets?

A. Yes, sir.

Mr. Mahoney: I offer those in evidence unless you have some objection.

Mr. Doyle: No, sir.

Two original order forms from Dr. J. V. Tate to Direct Sales Company, Inc., dated August 18th, 1936 and September 4th, 1936, respectively, hereinafter identified and referred to, are admitted in evidence as Defendants' Exhibit #5.

Q. Mr. Bransky, isn't it a fact that pursuant to this request for cooperation that you made to the Direct Sales Company, that whatever orders were received, whether you were at the plant or not, were put by Miss Hyatt right on your desk and left there until you came in?

A. I don't recollect that.

Q. You don't recollect that, but you do know that when you went in there and asked for cooperation that you wanted to inspect the records of narcotic orders received during your stay there?

A. Yes, sir, that is correct.

Q. And at no time did the Direct Sales Company refuse to cooperate with you in that manner?

A. That is correct.

Q. They extended every bit of cooperation you asked for. Is that correct?

A. That is correct.

Q. Now, Mr. Bransky, you said yesterday when this exhibit, Government's Exhibit #5, was offered in evidence, and Government's Exhibit #6, that these check marks had [fol. 189] a certain significance. Is that right?

A. That is correct.

Q. And you had a note right at the top of your exhibit?

A. Yes, sir.

Q. That is the explanation of the check-marks is it not?

A. Yes, sir. I meant by the check-marks that they were originally put in in pencil and I put ink over them so as to make it more permanent.

Q. What I thought, it says here that the ink marks denote registrants having account with the Direct Sales Company.

A. Yes, sir. I checked the ink marks over with a pen to make it more permanent.

Q. You know at the present time that Mr. Joseph Dotterweich is president of the Buffalo Pharmacal Company?

A. I do.

Q. He has another mail order business similar to the Direct Sales?

A. Yes, sir.

Q. You know that he is a competitor of Mr. George Dotterweich of the Direct Sales Company, at the present time?

A. Yes, sir, that is correct.

Q. You also recollect, do you not, that at the time you gave this to Miss Hyatt, a card system was immediately installed in the office of the Direct Sales Company? (Indicating list.)

A. They had a card system there of their accounts.

Q. And do you remember that pursuant to the receipt of this particular letter of August 12th, 1936, there were designations that were made by the Direct Sales Company in red typing of *Q*no narcotics"?

[fol. 190] A. Yes, sir.

Q. Now, that was a revision of their card system of all the doctors they had distributed to throughout the United States?

A. Yes, sir.

Q. And do you recall that there were approximately 14,000 doctors throughout the United States who had ordered from them?

A. 14,400.

The Court: 14,400 had ordered from them who were on the black list?

A. No, sir, the total number of accounts they had with doctors over the whole United States.

Mr. Mahoney:

Q. So their card system showed 14,400 doctors?

A. They told me that. I didn't check it.

Q. Yes, sir, but you saw a substantial list?

A. Yes, sir.

Q. And from your dealings with the Direct Sales at that time, there was no reason to believe that they were fabricating as to the number.

A. That is correct.

Q. Out of that 14,400, of course, you designated on this list 204 names?

A. That is correct.

Q. And out of the 204 names, 55 were found among the cards of the Direct Sales Company?

A. Yes, sir.

Q. And, of course, in order to find them in the cards of the Direct Sales Company, it was necessary for the employees of the Direct Sales Company to go through the lists of doc-[fol. 191] tors and when they found the names to pull the cards out?

A. Yes, sir.

Q. And on those particular cards with reference to the 55 out of the 204, you know the Direct Sales wrote in red, "no narcotics"?

A. I don't remember the exact language, but the purpose was not to send narcotics to these doctors.

Q. And the purpose was to keep a better check on the doctors?

A. Yes, sir.

Q. It was another manner of their cooperation?

A. They did just as I requested.

Q. So you do know that there was some designation on the cards wherein these 55 doctors would not be recognized if their orders came in?

A. Yes, sir. Mr. Mahoney, I also told them that if they shipped those people any narcotics, I was going to recommend their prosecution.

Q. Yes, sir, no doubt about that, but there had not been any attitude on their part that they were not going to recognize your suggestions and comply with them? In other words, they gave you the run of the office?

A. They cooperated with me.

Q. And gave you space in their office?

A. Yes, sir.

Q. And offered you the use of a typewriter in their own office?

A. Yes, sir.

Q. And authorized you to come in and out at any time?

A. While open for business.

Q. Certainly, you did not want to come in at midnight?

[fol. 192] A. No, sir.

Q. Subsequent to August 12th, 1936, Government's Exhibit #5, you or someone in your department had a change of heart as to the eligibility of these people?

A. I don't know. What do you mean by eligibility of these people?

Q. I mean you removed their ineligibility.

A. Yes, sir, those lists were revosed from time to time.

Q. While you were there?

A. That is correct.

Q. And your information relative to the revision of them came from where?

A. From the Commissioner of Narcotics at Washington, D. C.

Q. I will just show you the original of the copy here, directed to Mr. Joseph H. Dotterweich, President, Direct Sales Company, August 12th, 1936. Just follow me.

A. I just wanted to see my signature.

Q. That is your signature? (indicating)

A. That is correct.

Q. If you will just examine this for a moment, we might go down the names so that we may agree.

A. Yes, that—That is—That this is my list?

Q. Yes, that is—is that the original of this (indicating)

A. Yes, sir.

Q. Now, I am showing you the original letter of August 12th, 1936. That is the original of Government's Exhibit #5, which is a copy of the same letter?

A. Yes, sir.

Q. And I ask you as to whether or not that is not the [fol. 193] original letter of August 12th, 1936, that you gave Mr. Joseph H. Dotterweich, President of the Direct Sales Company?

A. It is.

Mr. Mahoney. I would like to offer that.

Letter from Joseph M. Bransky, Narcotic Agent, Special Detail, to Mr. Joseph H. Dotterweich, President, Direct Sales Company, dated August 12, 1936, containing a list of names of 204 physicians, hereinabove identified and referred to, is admitted in evidence as Defendants' Exhibit #6.

Q. In connection with this Defendants' Exhibit #6, I call your attention to the 4th page and to a Dr. Murtaugh,

F. M. Murtaugh, Jackson, Tennessee. That is your writing and initials, is it not?

A. That is correct.

Q. What you did on that occasion was to go into the Direct Sales Company and in regard to that doctor who had been put on this list on August 12th, on September 14th, approximately a month later, you drew that line through his name and ok'd it, "9-14 36 J. M. B." Is that right?

A. Yes, sir.

Q. So he was removed from the ineligible list and that made him competent to receive narcotics from the Direct Sales Company?

A. I was instructed to remove that name.

Q. You were instructed to remove that name, although in the first instance, on August 12th, you had put him on the black list, and then on September 14th, 1936, approximately a month later, you removed him from the black list?

A. Yes, sir.

Q. Your letter here says that the practitioner had been [fol. 194] convicted of a flagrant violation of the Harrison Narcotic Act. Do you know the reason for removing him from the list?

A. I don't recall.

Q. Do you know whether it is the policy of your department to take doctors off the black list who have been convicted of flagrant violations of the Narcotic Act?

A. Frankly, I don't know It is revised from time to time and the reason I don't know.

Q. That is done by some superior of yours?

A. That is done by some superior in Washington.

Q. They are superior to you?

A. Yes, sir.

Q. All you can say is that someone in Washington—would that be Mr. Anslinger or Mr. Wood?

A. Most likely Mr. Anslinger.

Q. He is the top man in the office?

A. Yes, sir.

Q. Have you any communication here where he directed you to remove Dr. Murtaugh of Jackson, Tennessee?

A. I may have in the files there. I would have to look it up.

Q. But you have not here in the file you have on the stand?

A. No, sir.

Q. On Page 5, Dr. Sothoron, of Washington, D. C., "9-19-36, J. M. B. O. K." You wrote that?

A. Yes, sir.

Q. That is just five days later than you had ok'd Dr. Murtaugh?

A. I removed him from the list.

Q. In other words, on August 12th, in that instance you stated to the Direct Sales Company that he had been con-[fol. 195] victed of a flagrant violation of the Harrison Narcotic Act, and, therefore, they were not to sell any narcotics to him whatsoever?

A. I told them if they did, I would recommend prosecution.

Q. Now, of course, that was a threat?

A. I just told them what I intended to do.

Q. And approximately a month and three days later, you removed him from that list of your own. Now, why did you remove Dr. Sothoron, of Washington, D. C., from the list?

A. That was done by direction of the Bureau in Washington.

Q. Again by Mr. Anslinger?

A. Yes, sir.

Q. Who was the head of the Bureau?

A. Yes, sir.

Q. I show you Dr. B. A. Tracy, of Hudson, Indiana, "9-8-36."

A. That is correct.

Q. The line is with your pen?

A. Yes, sir.

Q. The initials are yours?

A. Yes, sir.

Q. And the O. K. is yours?

A. Yes, sir.

Q. And that again is the same direction from Washington to remove him?

A. Yes, sir.

Q. Would you have a communication in your file as to this physician from your superior at Washington, as to Dr. Sothoron, September 19th, 1936, or as to Dr. Tracy on September 8th, 1936?

A. I don't have it in this file. The possibility is that I have it with me.

[fol. 196] Q. At recess or during the lunch hour you can look it up to see if you have any authorization.

A. Yes, sir.

Q. There is no question that you removed those from the list?

A. That is correct.

Q. Now, the other exhibit offered in evidence yesterday was dated August 21st, 1936, and is marked Government's Exhibit #6. Now, on this Government's Exhibit #6 offered in evidence yesterday, which is a carbon copy of your letter dated August 21st, 1936, addressed to Mr. Joseph H. Dotterweich, President, Direct Sales Company, I show you the original of that, which is signed "Joseph M. Bransky," and that was typed by yourself, was it not?

A. Yes, sir.

Q. And that Exhibit 5 of the Government, as well as Defendants' Exhibit #6, which is the original, was typed by you right in the office of the Direct Sales Company. Is that right?

A. Yes, sir.

Q. Now, this is your original?

A. Yes, sir.

Mr. Mahoney: I offer that in evidence.

Letter from Joseph M. Bransky, Narcotic Agent, Special Detail, to Mr. Joseph H. Dotterweich, dated August 21st, 1936, hereinable identified and referred to, is admitted in evidence as Defendants' Exhibit #7.

Q. Now, Mr. Bransky, on this particular list I show you a Dr. LeRoy Hawkins, of Scranton, Kansas, "J. M. B., 9-14-36."

A. That is correct.

Q. That is in your pen?

[fol. 197] A. Yes, sir.

Q. And that is your initials?

A. Yes, sir.

Q. This was given to the Direct Sales on August 21st, 1936?

A. Yes, sir.

Q. And about three weeks later you removed him from the list?

A. That is correct.

Q. Why?

A. My instructions from the Bureau in Washington.

Q. And, I suppose, you will check and see if you have that letter, will you not?

A. If you will be kind enough to furnish me those names.

Court recesses for a few minutes.

The Court: I understand, Gentlemen of the Jury, that it is agreed that as to the trial of the defendant, Clyde A. Foster, the case be withdrawn from the consideration of the jury. Is that the agreement?

Mr. Mahoney: That is satisfactory.

The Court: Put this in the record. Due to the illness of the defendant, Clyde A. Foster, at this stage of the trial, the District Attorney and the attorneys for the defendants, including the attorney for the defendant, Clyde A. Foster, have agreed that the trial as to the defendant, Clyde A. Foster, be withdrawn from the consideration of the jury. Proceed with the trial. Mr. Tinsley, the Court wants to thank you for representing the defendant, Foster.

Mr. Mahoney:

Q. Now, Mr. Bransky, you testified yesterday at the time. [fol. 198] Government's Exhibits #5 and #6 were introduced in evidence, which bear dates of August 12th and August 21st, 1936, that from time to time there were other additions or supplements made to the letter of the 12th of August. Is that correct?

A. Yes, sir.

Q. And do you have those with you?

A. No sir. They may be in the box in my room, and if you will give me the names I will be glad to furnish any information I can.

Q. Well, in regard to the letter of August 12th and the letter of August 21st, you have been in this Western District of South Carolina since when, Saturday of last week or Friday, in preparation of this case?

A. I arrived here Sunday night.

Q. From Atlanta?

A. Yes, sir.

Q. And, of course, this is right within your district, is it not?

A. Yes, sir.

Q. And you brought this letter of August 12th and the letter of August 21st over to court with you on Monday of this week when we started the trial?

A. That is correct.

Q. And, of course, you were checking your information and material that you had so as to lend what assistance you might in prosecuting this case on behalf of the United States?

A. Yes, sir.

Q. And, didn't you see any of those communications subsequent to that time and up to September, 1937?

[fol. 199] A. Yes, sir, I saw several of them.

Q. And didn't you bring them with you?

A. They are in my room. I had the ones introduced as evidence.

Q. Well, you haven't got them with you. Is that right, Mr. Bransky?

A. Well, just a moment, and I will see. I have one here, the one of August 28th. I just have the one of August 28th.

Q. And that is your trial file that you just referred to. Is that right?

A. Yes, sir, that is part of it.

Q. Now, I show you this letter of August 13th, 1936 to Mr. Joseph H. Dotterweich, President, Direct Sales Company. Did you write that?

A. Yes, sir.

Q. And you typed it yourself?

A. Yes, sir.

Q. And you included those four names on that list?

A. Yes, sir.

Q. And that was August 13th?

A. Yes, sir.

Mr. Mahoney: I offer this in evidence.

Letter from Joseph M. Bransky, Narcotic Agent, Special Detail, to Joseph H. Dotterweich, President, Direct Sales Company, dated August 13, 1936, hereinabove identified and referred to, is admitted in evidence as Defendants' Exhibit #8.

Q. Now, I notice here Dr. W. C. Bodie, Wagner, S. C., "9-24-36, J. M. B." and his name crossed out?

A. That is correct.

Q. You crossed that out did you?

[fol. 200] A. Yes, sir.

Q. In other words, you removed him from this so-called ineligible list?

A. Yes, sir.

Q. The next is Dr. Bozart, of Sherwood, Tennessee, 9-14-36. You crossed that out?

A. Yes, sir.

Q. And removed him from the ineligible list?

A. Yes, sir.

Q. The next is 9-25-36, Dr. Ellis, Rolla, Kansas. You crossed that out and put that o.k. on there?

A. Yes, sir.

Q. And that was just a month after you had given it to the Direct Sales Company. Is that right? 9-14-36 on that one?

A. Yes, sir.

Q. Now, you did that right in the Direct Sales office while still there on September 14th. That is September 14th, 25th, 24th, right in their office while still investigating, you crossed those names off the list?

A. Yes, sir, and delivered it to Miss Hyatt.

Q. Now, why did you strike those three names off the list?

A. Instructions from the Commissioner of Narcotics, Washington, D. C.

Q. Have you had a chance to look up those letters?

A. No, sir, they are not in the courtroom.

Q. You did have a chance to talk to Mr. Weatherwax?

A. Yes, sir.

Q. And it was relative to the letters?

A. I asked if he had these letters and where we could find them.

[fol. 201] Q. Here is one dated August 21st, 1936. (handing to witness)

A. That is right.

Q. I show you the signature at the bottom and ask you whether or not you signed that?

A. I did.

Q. And you delivered it to the Direct Sales Company, did you not?

A. Yes, sir.

Mr. Mahoney: Now, I offer that in evidence.

Letter from Joseph M. Bransky, Narcotic Agent, Special Detail, to Joseph H. Dotterweich, President, Direct Sales Company, dated August 21st, 1936, hereinabove identified and referred to, is admitted in evidence as Defendants' Exhibit #9.

Q. Now, I just want to digress to read this. "Sir: Reference is made to Official Order Form for opium, etc., executed by Dr. Martin M. Hage, Lake Mills, Iowa, Registry Number 1216, Classes 4-5, dated August 17th, 1936, calling for HT morphine sulphate grains one-half—5000, and received by your company August 19th, 1936. By direction of the Commissioner of Narcotics, Washington, D. C., it is suggested that this form be filled for one-fifth of the amount (1000 HT morphine sulphate grains one-half). Your cooperation in this matter is respectfully solicited." Now, in connection with that letter, you had that form in there before you of Dr. Hage, did you not?

A. Yes, sir.

Q. And as a result of the recommendation you made, the Direct Sales Company cut that order from 5000 to 1000, as you directed, and filled the order for that amount?

A. I think they did, yes, sir.

[fol. 202] Q. Now, I show you a letter here, Mr. Bransky, dated August 21st, 1936, and in connection with this it is not the original of Government's Exhibit # , which is dated the same date, and I ask you whether or not you didn't deliver that to the Direct Sales Company and if that isn't your signature at the bottom?

A. Yes, sir.

Mr. Mahoney: I offer it in evidence. It is another list, Mr. Doyle, of the doctors.

Letter from Joseph M. Bransky, Narcotic Agent, Special Detail, to Joseph H. Dotterweich, President, Direct Sales Company, dated August 21st, 1936, hereinabove identified and referred to, is admitted in evidence as Defendants' Exhibit #10.

Q. I show you letter dated August 26th, 1936, signed "Joseph M. Bransky, Narcotic Agent," directed to George J. Dotterweich, Treasurer, Direct Sales Company, and ask you whether or not you didn't take that and deliver it to the Direct Sales Company? Couldn't you answer that by looking at your signature?

A. No, I want to be sure of it.
Q. Is that your signature?
A. Yes, sir.
Q. You typed it, did you not?
A. Yes, sir.
Q. And gave it to the Direct Sales Company?
A. Yes, sir.
Q. On the date that appears. Is that right?
A. Yes, sir.

Mr. Mahoney: I offer that in evidence.

[fol. 203] Letter from Joseph M. Bransky, Narcotic Agent, Special Detail, to George J. Dotterweich, Treasurer, Direct Sales Company, dated August 26th, 1936, hereinabove identified and referred to, is admitted in evidence as Defendants' Exhibit #11.

Q. I show you the name of Dr. Charles W. Gower, Trenton, Kentucky.
A. That is correct.
Q. That appeared on this Defendants' Exhibit #11 dated August 26th, 1936?
A. Yes, sir.
Q. And I show you a line drawn through it and ask you if you drew that line through that name?
A. Yes, sir.

The Court: Can't you ask him about all those letters to save time? Can't you ask if all those names were stricken out and why he did it?

Mr. Mahoney: All right, I will combine them all in one.

Q. I show you the names of Dr. Gower, Dr. Hodges, Dr. Melter, and Dr. Repass, and ask you if you drew that line through those four names on the list?
A. Yes, sir.
Q. And that J. M. B. initials and the date is yours?
A. Yes, sir.
Q. And in drawing that line and okaying them, you were removing them from this ineligible list?
A. Yes, sir.
Q. And at whose authority?
A. The Commissioner of Narcotics.
[fol. 204] Q. And at the time you drew the line through those names and initialed them for the Direct Sales Company, do you know that they revised their files?

A. They revised them.

Q. They revised their list and do you know that they removed the doctors that you removed?

A. I don't know.

Q. I show you a letter dated August 27th, 1936. Is that your signature?

A. Yes, sir.

Q. It contains the names of two doctors?

A. Yes, sir.

Mr. Mahoney: I offer that in evidence.

Letter from Joseph M. Bransky, Narcotic Agent, Special Detail, to Direct Sales Company, dated August 27, 1936, hereinabove identified and referred to, is admitted in evidence as Defendants' Exhibit #12.

Q. I show you Defendants' Exhibit #12 containing the name of Dr. Connor and Dr. Curts.

A. That is right.

Q. On the date of this letter you asked them to add those names to the list of ineligibles to receive narcotics?

A. I did.

Q. And do you know that on that date those names were removed from their files?

A. Yes, sir.

Q. And on this date (indicating) did you draw lines through both of the doctors' names and remove them from the ineligible list?

A. Yes, sir.

[fol. 205] Q. And was that pursuant to instructions received from Mr. Anslinger?

A. Yes, sir.

Q. Commissioner in Washington?

A. Yes, sir.

The Court: How many more of those do you have?

Mr. Mahoney: I have nine here and my desk is cluttered.

The Court: How many more do you intend to use?

Mr. Mahoney: I have got to use them all.

The Court: Why not show them all and ask if his testimony as to those is not the same as those you have asked about. Why encumber the record with all of them? It will take an hour and a half or two hours to take them sepa-

rately. Just introduce all of them in evidence and ask if his testimony as to those is not the same as his testimony as to those you have just examined him about. Can't you do that?

Mr. Mahoney: I am just looking them over for a moment. There are some here just a little different from the others.

Q. Just examine these exhibits that I present to you and tell me as to whether or not they were dictated by you and if that is not your signature, will you please?

The Court: Just answer as to all of them. He is giving you them all at one time.

A. Yes, sir.

Mr. Mahoney:

Q. These are all additions to the list?

A. Yes, sir.

[fol. 206] Mr. Mahoney: I am offering them as one exhibit.

Mr. Doyle: They are all similar are they?

Mr. Mahoney: They include one of more doctors as he went along apprising them.

Group of 7 letters from Joseph M. Bransky, Narcotic Agent, Special Detail, to Direct Sales Company, dated August 28, 1936; August 31, 1936; September 1, 1936; September 8, 1936; September 14, 1936; September 20, 1936; and September 23, 1936, hereinabove identified and referred to, are admitted as Defendant's Exhibit #13.

Q. Now, Mr. Bransky, also while you were there, at the time you went into the Direct Sales Company you went in for the purpose of attempting to accomplish the type of set-up resulting in close cooperation between the Direct Sales Company and the Government relative to the carrying out of the provisions of the Harrison Narcotic Act?

A. Yes, sir.

Q. And you were giving them, as you testify, the benefit of your experience as to what they should fill, what they should not fill and curtailment, etc. Is that right?

A. Yes, sir.

Q. And eventually you got into the question of quantities?

A. Yes, sir.

Q. And in regard to the question of quantities of morphine sulphate, do you remember that quantities were suggested and the respective quantities that could be dispensed were discussed and mouthed over by you and Mr. Dotterweich and Miss Hyatt, and do you remember that a tentative table of the amounts was gotten out?

A. That is correct.

[fol. 207] Q. And I ask you to look at that, which was prepared in the office by Miss Hyatt and which was prepared after the discussions, and see if that is not the tentative plant that was set up pursuant to the suggestions as to the amounts and quantities. (Handing paper to witness.)

A. That is correct, yes.

Mr. Mahoney: I offer that in evidence.

Paper entitled, "Quantity of Morphine Sulphate Tablets," dated September 16, 1936, hereinabove identified and referred to, is admitted in evidence as Defendants Exhibit #14.

Q. In regard to Defendants' Exhibit No. 14, which you say came from the suggestions made by you and the conversations had with Mr. George Dotterweich and Miss Hyatt, who were cooperating with you, as to doctors, the figures are 1000 tablets and not over 4-⅛ ounces?

A. As to the thousand tablets, my recollection is that it was that amount. As to the other, I thought it was 2½, but that is probably correct.

Q. As to druggists, it was 3,000 tablets?

A. That is correct.

Q. Then you made the suggestion of reducing an order for 5000 to 2000 and 2000 to 1000?

A. I don't remember what that was.

Q. But this was broken down, and that resulted from your conversations?

A. Yes, sir.

The Court:

Q. That was 1000 tablets for what period?

A. There wasn't any period set.

[fol. 208] Mr. Mahoney:

Q. There was no period set, but this referred to one order form. Is that correct?

A. Yes, sir.

Q. Now, you said on your direct examination yesterday that this list, that is, the original list of August 12th, 1936, together with the supplements that have now been introduced in evidence on the part of the defendant, that eventually the Government itself made supplements?

A. The Commissioner in Washington furni-ed those lists.

Q. Yes, but it wasn't a supplement to your list that he furnished?

A. I don't know that.

Q. Don't you work in that close conjunction with your Commissioner that you have some conception or idea of the information he gives the trade?

A. Yes, sir, but I don't know whether he furnished that individually or whether that list was gotten up in Washington.

Q. I show you what is called, "Registrants' Mimeograph #10," dated August 11th, 1936, and in keeping with the date I ask you whether or not that wasn't the day before you went into the Direct Sales plant?

A. That is correct, sir.

Q. And you notice where that comes from, the office of the Commissioner of Narcotics?

A. Yes, sir.

Q. And you notice who it is signed by?

A. Mr. Anslinger.

Q. And he is your Commissioner and your superior?

[fol. 209] A. Yes, sir.

The Court: Mr. Mahoney, I think you are repeating this a little bit. Let's get along a little faster.

Mr. Mahoney: All right, your Honor, the best I know how.

The Court: In other words, you have asked the question a number of times as to who Mr. Anslinger is. It is necessary to ask that only once, because the jury is intelligent and I think the Court has some intelligence.

Mr. Mahoney: Thanks for the suggestion very much, your Honor. (I offer that in evidence.)

The Court: In other words, don't repeat unless it is absolutely necessary, because it just takes up time.

Paper entitled, "Registrants' Mimeograph #10," dated August 11, 1936, hereinabove identified and referred to, is admitted in evidence as Defendants' Exhibit #15.

Mr. Mahoney:

Q. Now, you are familiar with Mr. Anslinger's signature, are you not?

A. Yes, sir.

Q. I ask you to look at that letter dated April 8, 1937, and tell whether or not that came from the office of Mr. Anslinger and if that is his signature. Without reading the contents, if you will, please.

A. Yes, sir, I think that is Mr. Anslinger's signature.

Mr. Mahoney: I will offer that in evidence. Any objection, Mr. Doyle? (Submitting paper to counsel.)

Mr. Doyle: No, sir.

Letter from Mr. H. J. Anslinger, Commissioner of Narcotics, to Direct Sales Company, dated April 8, 1937, hereinabove referred to and identified, is admitted in evidence as Defendants' Exhibit #16.

Mr. Mahoney publishes portion of exhibit.

[fol. 210] Q. I show you this letter of August 23rd, 1939, directed to the Direct Sales Company, as well as the notice of Mr. Anslinger of August 16th, 1939, referring to Registrants' Mimeograph #25, and the Mimeograph itself, and ask you to examine that as to whether or not the letter came from Mr. Anslinger's office, the notice came from his office, and the mimeograph itself came from his office.

A. Mr. Mahoney, I have seen this mimeograph or one similar to this that was sent to our office in Atlanta, and these are similar.

Mr. Mahoney: I offer this, Mr. Doyle. He says he has seen one similar to this at his office that came from his superior, Mr. Anslinger.

A. They came from the Bureau in Washington.

Mr. Mahoney: I offer those.

Letter from Mr. H. J. Anslinger, Commissioner of Narcotics, to Direct Sales Company, dated August 23rd, 1939, together with notice and Mimeograph #25, dated August 16, 1939, enclosed therewith, hereinabove identified and referred to, is admitted in evidence as Defendants' Exhibit #17.

Q. Now, I show you a card, Mr. Bransky, and ask you if that is a card similar to the card system that was used by the Direct Sales Company that you saw during your examination, and if after the receipt of Government's Exhibit #6 here, or rather #5, the letter of August 12th, 1936, that isn't the way the Direct Sales Company set up the cards on the doctors you designated on the ineligible list? (Handing to witness.)

A. To the best of my recollection, at the time Miss Carrie Hyatt and I went through the list, she had a red pencil and made a notation on the cards. It is possible that she set it [fol. 211] up this way, but I do recall her making a notation on the list. There is a possibility that she set this up.

Q. You don't recollect, but you do know that she went through the files and made a red mark on each card?

A. A red mark on each card; a notation for showing the fact.

Q. At any time subsequent to that, did you see cards of this particular kind with the doctor's name on them and with that phraseology or designation at the top?

A. I don't recall. It could be correct, but I don't recall.

Q. I show you this letter, together with mimeograph, dated 2-3-40, and ask you if -- have seen those.

A. Those are similar to mimeographs I have seen, which were sent out by the Bureau of Narcotics.

The Court: Do those refer to names of doctors?

Mr. Mahoney: Yes, sir.

The Court: Just give them all.

Mr. Mahoney: I offer that.

Letter from H. J. Anslinger, Commissioner of Narcotics, to Direct Sales Company, together with Mimeograph #32 therewith enclosed, dated February 3, 1940, hereinabove identified and referred to is admitted in evidence as Defendants' Exhibit #18.

Q. Now, showing you Defendants' Exhibit #18, you notice it is dated Febraary 3rd, 1940?

A. That is right.

Q. And it is made out alphabetically?

A. That is right.

Q. I ask you to go down to the T's. Is the name of Dr. J. V. Tate, Registry No. 1378, on there?

A. It is not.

[fol. 212] Q. Now, I show you Defendant's Exhibit #15, dated August 11th, 1936, and ask you to proceed to the T's that start with Terwilliger and I ask you if Dr. J. V. Tate's name is on that?

A. It is not.

Q. I show you this mimeograph dated August 23rd, 1939, and ask you to refer to the T's and I ask you if Dr. J. V. Tate's name is on there?

A. It is not.

Mr. Doyle: To save time, we admit that his name is not on any of those, because he was not convicted at that time.

Mr. Mahoney: In keeping with that last statement, I believe he is forgetting his testimony.

The Court: Gentlemen, you may argue the case later. Don't consider any of those remarks, Gentlemen of the Jury. It is argument between counsel.

Mr. Mahoney:

Q. Now, Mr. Bransky, also at the time you were in the office, there were certain cases that came up, that is, certain orders were received that you disapproved of. Isn't that right?

A. There is a possibility, yes, sir.

Q. Well, showing you that Government's Exhibit #5, which was your letter of August 12th, 1936, you had the name of Dr. Murtaugh on there, did you not?

A. Yes, sir.

Q. And as a result of Dr. Murtaugh being on that list, isn't it a fact that when his order came into the Direct Sales Company on or about August 24th, that you dictated a form letter that could be used by the Direct Sales Com-[fol. 213] pany for the purpose of informing him that his order would not be filled?

A. I didn't dictate a form letter. Miss Hyatt discussed a form letter with me and it was her dictation and not mine.

Q. What was your suggestion relative to a form letter?

A. I don't recall my suggestion to Miss Hyatt. If I saw the letter, from the phraseology I may be able to answer.

Q. All right, sir, there is the letter with reference to Dr. Murtaugh. (Handing paper to witness.)

A. Miss Hyatt showed me this letter. It is not my phraseology, and I didn't approve or disapprove sending this letter to the doctor.

Q. She showed it to you before it went out?

A. Yes, sir.

Q. And it was the result of that letter of August 21st to the Direct Sales Company?

A. Yes, sir.

Q She showed you the letter before it went out?

A. That is correct. That is her notation on it. It is possible that I have the letters in my file.

Q. And you saw this letter and made no objection to it?

A. That is correct.

Q. And on the strength of it, Dr. Murtaugh's order was returned?

A. That is right.

Q. On the strength of the fact that you had disapproved it because he was on the list as a flagrant violator?

A. Yes, sir.

Q. Now, you removed Dr. Murtaugh the following month didn't you?

A. The record will show if he was removed. I don't recall those things. If the record shows that he was removed, why he was removed.

[fol. 214] The Court: Isn't all that in evidence to show whether he was removed?

Mr. Mahoney: I am showing nothing except what the record shows.

The Court: Why prove it again if it is already proved? It seems to me you have proven different things too many times.

Mr. Mahoney: In that connection, I merely want to suggest to the Court, and your Honor appreciated I suppose from a legal standpoint, that I want a record here.

The Court: Absolutely. You are going to get a record, but it is not necessary to prove one fact by one witness more than one time is it?

Mr. Mahoney: Other than the fact that if it is disputed, I want that record with the jury.

The Court: I didn't understand that he disputed it. The Court will appreciate it, and I want you to get everything in the record you wish, but with your experience and ability I am sure that you can shorten it, and I hope you will.

Mr. Mahoney:

Q. At the time that this was received by the Direct Sales Company—I am referring to this letter from Dr. Murtaugh

of August 21st, 1936, it was called to your attention was it not?

A. It was, sir.

Q. And it was on the strength of that that the copy of this letter was given you?

A. Yes, sir.

Mr. Mahoney: Look at this Mr. Doyle, I am offering them.

[fol. 215] Mr. Doyle: We don't object to them.

Mr. Mahoney:

Q. Look at this letter to Dr. Gower, Gainesville, Georgia, dated August 25th, 1936. (Handing paper to witness.)

A. Yes, sir.

Q. And this date here, September 18th, you were in the plant? (Handing paper to witness.)

A. Yes, sir.

Q. And on September 15th, you were in the plant?

A. I don't remember. I was in and out in September.

Q. Well, there is August 18th. (Handing paper to witness).

A. On August 18th I was in the plant.

Q. So that covers the four of them.

A. What about this letter? (indicating).

Q. This is the letter I showed you. "Two copies to Mr. Bransky".

A. That is correct.

Mr. Mahoney: I will offer these as one exhibit.

The group of letters hereinabove identified and referred to, being letter from Dr. Frank M. Murtaugh to Direct Sales Company, dated August 21, 1936; letters from Direct Sales Company to Dr. Frank M. Murtaugh, dated August 24, 1936 and September 15, 1936; letter from Dr. H. J. Morton to Direct Sales Company, dated September 10, 1936; letters from Direct Sales Company to Dr. H. J. Morton, dated September 15, 1936 and September 18, 1936; letter from Dr. J. C. Gower to Direct Sales Company, dated August 22, 1936; letters from Direct Sales Company to Dr. J. C. Gower, dated August 25, 1936 and April 13, 1937; letters from Direct Sales Company to Dr. B. Allen Tracy, dated August 18, 1936 and September 15, 1936, are admitted in evidence as Defendants' Exhibit #19.

Q. Now, I show you Government's Exhibit #7, which is Price List #89, and I show you this. "For 100 tablets take one-tenth of thousand price plus 10 cents." So it appears in there?

A. Yes, sir.

[fol. 216] Q. I show you this narcotic blank which says, "For 100 tablets take one-tenth of thousand price plus 10 cents."

A. That is correct.

Q. And so that says distinctly that for an order for 100 tablets, you take the price of one-tenth of a thousand and add ten cents to it. Is that right?

A. That is correct, sir.

Q. I show you this letter dated October 29th, 1936, from the Bureau in Washington, with Mr. Anslinger's signature, and will you tell the Court and jury as to whether or not you recognize that as Mr. Anslinger's signature?

A. I think that is Mr. Anslinger's signature.

Q. You have seen his handwriting on numerous occasions?

A. Yes, sir.

Mr. Mahoney: I offer this in evidence.

Letter from H. J. Anslinger, Commissioner of Narcotics, to Direct Sales Company, dated October 20, 1936, hereinabove identified and referred to, is admitted in evidence as Defendants' Exhibit #20.

Mr. Mahoney publishes portion of exhibit to jury.

Q. No, Mr. Bransky, you are somewhat familiar with the rules and regulations of the Treasury Department, Bureau of Narcotics?

A. Yes, sir.

Q. Of course, the rules, the original ones, run up to 112, do they not? You are familiar with this copy of the regulations. Number 5, etc., you are familiar with that? (Showing to witness.)

A. Yes, sir.

Q. You notice it is from the Treasury Department?

A. Yes, sir, I am just wondering if that is the latest, Regulations 5.

[fol. 217] Q. Other than that it is the regulations? You see Article 11. It refers to the Commissioner of Prohibition.

A. Yes, sir.

Q. Since then the Commissioner of Prohibition has been succeeded by the Commissioner of Narcotics, Mrs. Anslinger? Is that right?

A. Yes, sir.

Mr. Mahoney: That is all, your Honor, thank you.

Redirect examination.

By Mr. Doyle:

Q. Defendants' Exhibit #16 was your letter of April 8th, 1937, and that is the one from which counsel read the third paragraph?

A. Yes, sir.

Q. You see better than I do. Read the first and fourth paragraphs. (Handing paper to witness.)

Mr. Mahoney: Is that Exhibit 16?

A. Yes, sir, Exhibit 16, dated April 8th, 1937, from the Commissioner of Narcotics at Washington, D. C., to the Direct Sales Company. (Reads.)

Q. Does that refresh your memory as to why he was either removed from the list or permitted to order it?

A. I had letters of that type from the Bureau.

Q. And does that explain the reason why some of the others may have been restored under similiar conditions?

Mr. Mahoney: I object, your Honor. He says he has the letters.

Mr. Doyle: Well, I will let him get the letters.

Q. With respect to Defendants' Exhibit 20, the letter you [fol. 218] identified from Mr. Anslinger, counsel read the third paragraph from that letter and I now wish to read it all. "Gentlemen: In connection with its policy of restricting the distribution and use of narcotics to legitimate medical purposes, the Bureau is soliciting the active cooperation of manufacturers and wholesale dealers to the end that drugs will not be furnished to practitioners who are known to have been dispensing or selling such drugs for other than legitimate medical purposes, and to the further end that such drugs will not be furnished in any case in excessive quantities." And then you made that agreement of the limit on order forms of 1000 to a physician.

Now, the purpose stated in that letter and the purpose you went to talk to them about was to restrict the size of orders of narcotics?

Mr. Mahoney: I object to that. It is leading. The District Attorney will have to take the stand.

The Court: I sustain the objection. The way to ask the question, Mr. District Attorney, is for what purpose.

Mr. Doyle: I respectfully suggest that I was examining about his exhibit and not any of mine.

Mr. Mahoney: You cannot lead anyway.

The Court: The Federal procedure is that you make him your witness on that point, but the better practice is not to lead. To be frank, I am not in favor of leading questions on direct or cross, because the jury gets the idea that it is the lawyers testifying instead of the witnesses, and it is better on direct and cross to ask the question and let the witness testify. So you can ask for what purpose it was.

[fol. 219] Mr. Doyle:

Q. Mr. Mahoney, asked if you were not in and out of the office of the Direct Sales Company. Some days you were there and some not?

A. That is correct.

Q. And he asked if you were not going to other drug companies and checking them?

A. That is correct.

Q. Were your dealings with those other companies similar to your dealing with this company?

Mr. Mahoney: I object to that.

The Court: What is the purpose of that?

Mr. Doyle: The point he makes is that he was going around to other people and checking over their records in the same manner he was checking these.

Mr. Mahoney: Oh, no.

The Court: What difference does it make?

Mr. Doyle: Suppose he says he was not overseeing the operations of any other drug company in the way he was this one?

The Court: Well, counsel says that was not his purpose so that withdraws that.

Mr. Mahoney: Just one question.

The Court: Is it in reply to any new matter?

Mr. Mahoney: No, sir, it isn't.

The Court: Do you think it important to ask it?

Mr. Mahoney: I just want to identify one matter. I should be able to get it in.

Mr. Doyle: Let me see it. I will admit it.

Witness leaves stand.

[fol. 220] Dr. C. H. Blake, a witness produced on behalf of the United States, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Doyle:

Q. Dr. Blake, you practice medicine here in Greenwood?

A. Yes, sir.

Q. How long have you been practicing medicine?

A. Thirty years.

Q. Where did you get your medical education?

A. Medical College of South Carolina.

Q. Are you a member of the State Board of Medical Examiners of the State of South Carolina?

A. I am.

Q. Doctor, will you briefly tell the jury what standard dose or dosage is customery in the use of morphine in your profession?

Mr. Mahoney: I object on the ground that it is incompetent, irrelevant and immaterial.

The Court: Objection overruled. Exception taken and allowed. Just answer the question.

A. The dose varies from one-eighth to one-quarter, and in rare cases one-half.

Mr. Doyle:

Q. Is it the treatment for any disease?

Mr. Mahoney: I object to that.

The Court: Objection overruled. Exception taken allowed.

A. No.

Mr. Doyle:

Q. What is the purpose of it?

A. The purpose of morphine is to ease pain and act as a [fol. 221] sedative to inflamed mucous membrane as in the respiratory tract and such as that.

Q. Is it when used for any given period a habit-forming drug?

Mr. Mahoney: I object to that.
The Court: Objection overruled.
Mr. Mahoney: Exception.
The Court: Exception allowed.

A. Yes, sir.

Mr. Doyle:

Q. Can other drugs be used with equal success and good effect in the course of your practice?

The Court: Objection sustained. That has nothing to do with it.

Mr. Doyle:

Q. Is codein used by your profession for the same purposes that morphine is used?

Mr. Mahoney: I object to that.

The Court: You haven't got them charged with administering codein. What difference does that make? Suppose he could use what this doctor gave this man who got sick. What was it?

A. Nitroglycerin.

The Court: You are basing your case on circumstantial evidence. Now, the way you are attempting to prove a conspiracy is by circumstances. What difference does it make whether you can alleviate pain by codein, nitroglycerin, or what?

Mr. Doyle: It is a circumstance that Dr. Tate didn't order any codein from them at all, or, if so, only a small [fol. 222] amount, and it would be likewise a circumstance, if codein is being more commonly used, that this company manufactures several times more codein that morphine and Dr. Tate has never bought any codein.

The Court: What do you say?

Mr. Mahoney: I say it is not competent on that theory or any other theory. I came down here confronted with an indictment on morphine sulphate. It was the District Attorney who prepared the indictment that was passed on by the grand jury, and I say that codein, nitroglycerin, or anything else has nothing to do with our situation whatsoever and doesn't make it competent under any circumstances.

Mr. Doyle: Your Honor knows that the ultimate question is the question of good faith.

Mr. Mahoney: He has made that statement three times and I don't know whether it is argumentative or whether he is trying to bring that to the jury.

The Court: I don't think so. I will admit it for whatever it is worth as a circumstance in the case.

Mr. Mahoney: I will take an exception.

The Court: Exception allowed.

Mr. Doyle:

Q. Doctor, state the uses of codein briefly.

Mr. Mahoney: I object.

The Court: It is already objected to. It is not necessary to object and except twice.

A. Codein is used to relieve pain and act as a sedative; very much the same purpose as morphine, except that it is very much milder in effect.

[fol. 223] Q. Is it habit-forming?

Mr. Mahoney: I object.

The Court: That objection is sustained.

Mr. Doyle:

Q. State briefly what proportion you use in your practice of morphine to codein.

Mr. Mahoney: I object to that. It has no relevancy whatsoever.

The Court: Objection overruled. Exception allowed.

A. I use a hundred codein tablets to one of morphine, or rather one hundred doses of codein to one of morphine.

Q. From your experience, is that more or less the general use of the profession?

Mr. Mahoney: I object to that.
Mr. Doyle: I withdraw the question.

Cross-examination.

By Mr. Mahoney:

Q. Docter, codein is a narcotic as well as morphine?
A. Yes, sir.
Q. And there is a codein sulphate that is made up in smaller sizes, quarter, eighth and half-grain. Is that correct?
A. That is correct, sir.

Mr. Mahoney: That is all.

Witness leaves stand.

W. F. Weatherwax, a witness produced on behalf of the United States, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Doyle:

Q. Mr. Weatherwax, are you a narcotic agent?
A. Narcotic inspector.
[fol. 224] Q. How long have you been engaged in that kind of work?
A. Since July, 1924.
Q. Had you before that time been a pharmacist?
A. I had.
Q. Were you assigned to the investigation of Dr. Tate?
A. That is right.
Q. Approximately what time was it?
A. It was the latter part of February, 1939.
Q. Did you then make a preliminary investigation?
A. I did.
Q. And briefly what did you do when you went to see him?

Mr. Mahoney: I object. It is incompetent, irrelevant and immaterial as to the Direct Sales Company.
The Court: What was the question?
Mr. Doyle: I asked at the beginning of the investigation of Dr. Tate what he did?

The Court: How could that be competent, Mr. District Attorney, without the presence of the Direct Sales Company?

Mr. Doyle: I am not asking what he said, but what he did.

Mr. Mahoney: That is incompetent.

The Court: Go ahead and tell what you did and if it is incompetent, I will strike it out.

A. I made an inspection of Dr. Tate's duplicate order forms over a period of approximately thirteen months.

Mr. Mahoney: I object to that.

The Court: Is that all of your answer?

A. To that, yes, sir.

[fol. 225] The Court: Objection overruled. Exception allowed.

Mr. Doyle:

Q. You made an examination of the duplicate order forms that are in evidence?

A. Yes, sir.

Q. Did you take them up at the time?

A. No, sir.

Q. You took them up at a later date?

A. Yes, sir.

Q. That was a preliminary examination of these things. As the result of that, did you report your findings?

Mr. Mahoney: I object to that.

Mr. Doyle: I am not going to ask what he reported.

Q. Were you then called off the examination?

Mr. Mahoney: I object to that.

The Court: I am letting this testimony in at the present time and I will pass on it later. It is understood that counsel objects to all this testimony.

Mr. Mahoney: And you reserve your ruling on it?

The Court: Yes, sir.

Mr. Doyle:

Q. Were you sent to make the investigation or was or not Mr. Lanigan first sent there?

A. There was an interval there when they sent Mr. Lanigan and George C. Johnson.

Mr. Mahoney: Your Honor, I must object. I cannot sit through this historical narration.

The Court excuses the jury.

The Court: In the first place, Mr. District Attorney, what is the purpose of your examination?

[fol. 226] Mr. Doyle: Your Honor, we have already been through these preliminaries.

The Court: Then what is the purpose?

Mr. Doyle: We customarily do that.

The Court: Why do you? Go ahead and ask him.

Mr. Doyle:

Q. I was just accounting for your contacts with the investigation. You told about the first time you went there, and when did you go again?

Mr. Mahoney: I object to that.

A. I sent Mr. Lanigan and George C. Johnson to Dr. Tate for the purpose of getting evidence on the 16th. of June, 1939.

The Court: That testimony is incompetent, because it is detailing what took place without any of the defendants present. It is a conversation between him and the men he sent, telling them what to do. It is incompetent. Ask another question.

Mr. Doyle:

Q. Mr. Weatherwax, did you subsequently go back to Dr. Tate's place?

A. I did.

Q. Did you interview him?

A. I believe it was February, 1940, before I went back to his office.

Q. Did you ever go to the office of the Direct Sales Company?

A. Yes, sir.

Q. When?

A. It was in the spring of 1941, April, I think.

The Court: You don't object to that?

Mr. Mahoney: It is up in 1941. It is beyond the pale [fol. 227] of the alleged conspiracy.

Mr. Doyle:

Q. While there did you ask to see the original order forms in their office that Dr. Tate had given them?
A. I did.

The Court: Bring the jury back. Under my ruling, you can ask if he made an investigation of Dr. Tate's records, and after that did he go to the Direct Sales Company for an investigation. Counsel objects and takes an exception and the exception is noted.
The jury is brought in.

Mr. Doyle:

Q. Mr. Weatherwax, did you ever go to the office of the Direct Sales Company, in Buffalo, New York?
A. I did.

The Court: I ruled that you could ask if he made an investigation of Dr. Tate's records.
Mr. Doyle: I thought you stopped me.

Q. Did you make an investigation of Dr. Tate's records?
A. I did.
Q. After having done so, did you go to Buffalo, New York?
A. I did, sir. It was sometime in the spring of 1941.
Q. Did you see Mr. Dotterweich?
A. I saw Mr. Dotterweich's son, who was in charge of the plant at that time.

The Court:

Q. What position did Mr. Dotterweich hold with the firm, if any?
A. He was Vice President, I think, in charge of produc-[fol. 228] tion is my understanding.

Mr. Mahoney: Your Honor, as to his understanding, I ask you to instruct the jury to disregard his understanding.

The Court:

Q. Do you know that he was?
A. He was introduced to me as the man in charge of the plant.

The Court: Objection overruled.

Mr. Mahoney: Exception.

The Court: Exception allowed.

Mr. Mahoney: This was an alleged conversation had in the spring of 1941 and the indictment charged that it extended from 1933 to 1940.

Mr. Doyle:

Q. What, if anything, did you ask him for?

A. I requested him to get out the original narcotic order forms issued by the Direct Sales Company to Dr. John Victor Tate during the period from about May 24th, 1940 back as far as they were available, that is, the records that they had available.

Q. Did they produce the order forms that they had from Dr. Tate between the dates in this indictment?

A. They produced the order forms between the dates approximately of January 1st—I believe the earliest order was January 6th, 1934 to May 24th, 1940.

Q. All right, sir, did you ask to be permitted to photostat those originals?

A. I did.

Mr. Mahoney: I object on the ground that it is leading.

The Court: Quit leading the witness and ask what he did.

[fol. 229] Mr. Doyle:

Q. What did you do?

A. I requested permission to take the order forms from the plant or have them sent by an employee of the firm with me to a photostating place to have photostatic copies made of the original order forms.

Q. Did you?

A. I did.

Q. Have you those photostatic copies with you?

A. They are on the desk. (indicating)

The Court: Have you submitted those to counsel?

Mr. Doyle: Yes, sir, last night. I offer them.

Mr. Mahoney: I object on the ground that they are incompetent, irrelevant and immaterial. If you will examine this indictment, you will find that the overt acts from 2 to 24 set up sales between the Direct Sales and Dr. Tate pursuant to the official narcotic form as prescribed by statute.

You will find the counts from 25 to 53 set forth other alleged overt acts that were engaged in by the alleged co-conspirators other than the Direct Sales Company. They are not mentioned whatsoever. You will find, your Honor, that the first 24 overt acts set up the alleged sales between the Direct Sales and Dr. Tate pursuant to this order form, and then there is the so-called agreement or alleged illegal agreement which they claim is the gist of the conspiracy, and after that are the alleged overt acts alleged to have carried out this alleged conspiracy. The first is June 16th, 1939 that Lanigan and Johnson have testified to in this particular case. I think your Honor can appreciate the [fol. 230] position that as a result of whoever drew this indictment, that the first overt act alleged that has been carried out in this alleged agreement is June 16th, 1939, when Lanigan and Johnson went down to Dr. Tate's at Calhoun Falls and made a purchase. There is no overt act prior to that time anywhere between 1933 and 1939. There is not an iota of evidence that Dr. Tate sold to anybody prior to June 16th, 1939. It is a matter of law that you and I or anybody can enter into an agreement, legal or illegal, and if illegal so that it could be a conspiracy, it never ripens until some act is alleged and until the proof is on all fours with the overt act.

The Court: In other words, his contention is that the conspiracy is not completed until some overt act is done pursuant to the agreement.

Mr. Doyle: That is true.

The Court: Now, how can you prove that?

Mr. Doyle: We are not restricted to the proof laid out in the indictment.

The Court: What is the purpose of that proof you are offering now? Is that a circumstance to prove an agreement or proof of an overt act alleged in the indictment?

Mr. Doyle: The purpose is to prove an overt act.

The Court: I will admit it for that purpose.

Mr. Mahoney: Exception.

The Court: Exception taken and allowed.

Group of photostatic copies of order forms from Dr. J. V. Tate to the Direct Sales Company, dated from January 6, 1934 to May 24, 1940, are admitted in evidence as Government's Exhibit #11.

[fol. 231] Mr. Doyle:

Q. Those photostats cover the period of the indictment?

A. Those are photostats of the original order forms that were in the Direct Sales Company on April 29th, 1941, that cover the period from January 6th, 1934 to May 24th, 1940.

Q. Now, Mr. Weatherwax, we don't want to examine them one at a time. Have you gone through and tabulated these order forms?

A. No, sir, I don't have a complete tabulation of them.

Q. What period does your tabulation cover?

A. My tabulation covers the period from November 24th, 1937 to January 27th, 1940.

Q. All right, sir, may I see it?

A. (Witness hands paper to counsel).

Q. Did you make this tabulation yourself?

A. Yes, sir.

Mr. Doyle: I offer it in evidence. (submits to counsel)

Mr. Mahoney: I object to it, your Honor, not as to the question that it is not a correct tabulation, but it has some self-serving pencil memoranda on the right that I absolutely object to.

Mr. Doyle:

Q. You made those also, Mr. Weatherwax?

A. Yes, sir.

Q. What do they refer to?

Mr. Mahoney: I object.

The Court: Let me see it.

Mr. Doyle hands paper to Court.

The Court: I will let you answer the question. What are those pencil marks?

A. They were merely put there for my own convenience [fol. 232] and show the total amount purchased by Dr. Tate or the sum total by months.

Mr. Mahoney: I ask that that be stricken out.

The Court: Objection overruled and exception taken and allowed.

Mr. Doyle:

Q. Now, Mr. Weatherwax, did you also make a tabulation and analysis of the records used by the Postmistress at Calhoun Falls?

A. I did with Mr. Bransky.

The Court: You could add on there what he says those pencil marks indicate so there won't be any confusion about the records.

Mr. Doyle: Do you want it put on there?

The Court: I don't want anything, but I suggested it so there won't be any confusion.

Mr. Doyle:

Q. Write up there that the pencil figures indicate the total purchases by months. (handing paper to witness).

A. (Witness writes notation on paper).

Q. Now, did you also tabulate the COD orders that were introduced in evidence?

A. The actual tabulation was actually done by Mr. Bransky from figures dictated to him by myself from the records.

Q. You and he together?

A. Yes, sir.

Q. What period of time does it cover?

A. It covers the period from March 6th, 1934.

Q. Is that as far back as the records were available?

A. Yes, sir, down to May 27th, 1940.

[fol. 233] Q. And May 27th, 1940, is the last one?

A. That is right.

Mr. Doyle: All right, I offer it in evidence.

Mr. Mahoney: I object on the ground that it is incompetent, irrelevant and immaterial on the basis I have told you before, that that is no evidence of an agreement whatsoever, because you can appreciate that they brought this down to 1940, as well as the prior exhibit. Now, the District Attorney told you that he was offering it only for *for* showing an agreement. The agreement must anti-date the overt acts, but now you are allowing here in this exhibit overt acts that occurred subsequent to the alleged agreement.

The Court: Well, Mr. Mahoney, the Courts have held that you can prove the agreement by overt acts. I will admit the evidence and you can take an exception.

Mr. Mahoney: Exception.
The Court: Exception allowed.

Tabulation of order forms from Dr. J. V. Tate to the Direct Sales Company, Inc., for the period from November 24, 1937 to January 27, 1940, hereinabove identified and referred to, is admitted in evidence as Government's Exhibit #12.

Tabulation of CGD records at Postoffice, Calhoun Falls, S. C., for the period from March 6, 1934 to May 27, 1940, hereinabove identified and referred to, is admitted in evidence as Government's Exhibit #13.

Mr. Doyle:

Q. During the period covered by the alleged conspiracy between these defendants, so far as you were able to find records and analyze them, what is the amount of morphine that Dr. Tate bought from the Direct Sales Company?

Mr. Mahoney: I object to that. It is incompetent, irrele-
[fol. 234] vant and immaterial.
The Court. Isn't that in his tabulation?
Mr. Doyle: I don't think in this tabulation.
The Court: Is it included in any tabulation?
Mr. Doyle: No, sir.
The Court: Have you added it up?
A. Yes, sir.
The Court: Let him add it up and introduce his figures.
Mr. Mahoney: Exception.
The Court: Objection overruled and exception allowed.

Mr. Doyle:

Q. Mr. Weatherwax, from these postoffice records, Exhibit #13, and also Exhibit #12, from the date of June 30th, 1939, the date of this letter from the Direct Sales Company to Dr. Tate, for the next thirty days after the receipt of that letter how much morphine did he order from the Direct Sales Company?

Mr. Mahoney: I object to that.

A. He ordered 6000 half-grain tablets.

The Court: Exception allowed.

Mr. Doyle:

Q. State whether that is more or less than the amount he ever ordered in a similar period.

Mr. Mahoney: I object to that. It is incompetent, irrelevant and immaterial.

The Court: Objection overruled.

A. It is more.

Mr. Mahoney: Exception.

The Court: Exception allowed.

[fol. 235] Mr. Doyle:

Q. By how much?

A. By 1000 tablets.

Q. From your postoffice records and likewise the order forms, what do you find with respect to the Direct Sales Company sending COD packages to Dr. Tate? What do you find about the regularity of them?

Mr. Mahoney: I object to that as calling for a conclusion.

The Court: Did you tabulate it from the records?

A. Yes, sir.

The Court: Objection overruled.

Mr. Mahoney: Exception.

The Court: Exception allowed.

A. I found that these packages were received with regularity and greatly increasing frequency.

Mr. Mahoney: I object to that still as a conclusion.

The Court: I think if he objects to it, you will have to read from the record which shows it. Doesn't that all appear in the tabulation?

A. Yes, sir.

The Court: It is already in evidence; what regularity and what amounts.

Mr. Doyle: Well, your Honor, I will have to stop and read that tabulation.

The Court: All right.

Mr. Doyle: I thought I could shorten it by this method. If I cannot, I will have to read it.

The Court: You will first have to state what it shows.

[fol. 236] It is an audit; that is what it is. You will have to read it from the audit.

Mr. Doyle: I didn't want to take the time to do it. I will read from the last page of it.

The Court: Let the witness read from the last page if that shows the totals. It seems to me that your tabulation should show that on June 1st he received so much and that on such and such a date so much, and then he could read how much the increase was from that date to the other date.

Mr. Doyle: It does show that. I just didn't want to take the time.

The Court: Counsel objects and he has the right to.

A. The last page shows: on October 4th, 1939, 1000 half-grain tablets. That is Order Form No. C754495.

Q. Would it be agreeable to leave those numbers off?

A. On October 7th, 1939, 1000 half-grain tablets morphine sulphate; on October 12th, 1939, 1000 half-grain tablets; October 18th, 1939, 1000 half-grain tablets; October 25th, 1939, 1000 half-grain tablets; November 4th, 1939, 1000 half-grain tablets—all of these are morphine sulphate; November 11th, 1939, 1000 half-grain tablets; November 13th, 1000 half-grain tablets; November 20th, 1939, 1000 half-grain tablets; November 23rd, 1000 half-grain tablets; December 2nd, 1939, 1000 half-grain tablets; December 8th, 1939, 1000 half-grain tablets; December 16th, 1939, 1000 half-grain tablets; December 22nd, 1939, 1000 half-grain tablets; December 29th, 1939, 1000 half-grain tablets; January 6th, 1940, 1000 half-grain tablets; January 12th, 1940, 1000 half-grain tablets; January 15th, 1940, 1000 half-grain [fol. 237] tablets; January 22nd, 1940, 1000 half-grain tablets; January 27th, 1940, 1000 half-grain tablets.

The Court: Now, after he has read those, you can ask the general question whether it increased or decreased.

Mr. Doyle:

Q. State whether or not from your analysis the orders increased or decreased?

A. They increased.

Q. Throughout the entire period?

A. Throughout the entire period.

Q. What do you find with respect to two packages being in the postoffice at or near the same time?

Mr. Mahoney: I object to that. We are not accountable for the mail carriage. We are only accountable for operating under the Harrison Narcotic Act.

The Court: What was the question?

Mr. Doyle: I asked whether or not he found that two packages were there on or about the same date.

The Court: What is the purpose of this?

Mr. Doyle: Here is their defense——

Mr. Mahoney: I object to that argument.

The Court: I will admit it. Exception allowed.

Mr. Doyle:

Q. Answer the question.

A. I found on November 13th, 1939 there was a package mailed from Buffalo to Dr. J. V. Tate, which reached Calhoun Falls on November 17th, 1939 and was delivered on November 17th, 1939 to Ruth Hill. On November 15th, 1939, another package was mailed from Buffalo, New York, [fol. 238] received at the Postoffice on November 17th, 1939, and delivered to Ruth Hill on November 18th, 1939.

Mr. Mahoney: I move at this time to strike this out because that involves the postoffice, the alleged delivery and the time of pickup.

The Court: I will let it in for whatever it is worth.

Mr. Mahoney: Exception.

The Court: Exception allowed.

Mr. Doyle: You may examine him.

Cross-examination.

By Mr. Mahoney:

Q. What ruse did you use when you went to Buffalo to get the photostatic copies?

A. I said I had been sent to get photostatic copies.

Q. For what purpose?

A. I didn't tell them.

Q. You didn't tell them anything about the convenience of witnesses, etc.?

A. They mentioned the fact themselves and I said perhaps so.

Q. And what was the convenience you say they mentioned themselves?

A. To avoid bringing them down here to testify against Dr. Tate.

Q. At the time you went there in 1939, you knew it wasn't for the purpose of them being witnesses against Dr. Tate?

A. No, I didn't know.

Q. You knew what you were up there for. Is that right?

A. Certainly.

Q. And you knew you were up there to get evidence from [fol. 239] the Direct Sales Company for evidence against themselves?

A. Not specifically.

Q. Whether specifically or not, did you know that?

A. No, I didn't know.

Q. You knew where the monthly records were in the Washington office?

A. I suppose so.

Q. You knew that the Washington office had a monthly record of sales made to every doctor?

A. Well, I cannot say it has.

Q. Don't you know enough about the operation to know that a report of every sale has to be made before the 15th of the ensuing month?

A. Yes, sir.

Q. And you knew that the Washington office had a monthly record of the Direct Sales Company of every order they filled?

A. No, I didn't know that.

Q. You knew the Act provided for it?

A. I knew the Act provided for reports to be made and submitted to the Collector of Internal Revenue of the District. Now, as to where copies of those records went, I had no personal knowledge.

Q. How long have you been connected with the service; you say from 1924?

A. Yes, sir.

Q. And you have always been connected with the Atlanta office?

A. Yes, sir.

Q. You have seen these monthly reports made by manufacturers?

A. Yes, sir.

[fol. 240] Q. Haven't you seen what was done with them so far as the district office is concerned?

A. No, sir.

The Court: What is the purpose of this?

Mr. Mahoney: I want to show that these were not necessary.

The Court: It was necessary for you to go and get those order forms?

A. Yes, sir, I was ordered to do it.

Mr. Mahoney:

Q. Ordered by whom?

A. Mr. Greason, District Supervisor, Bureau of Narcotics. The order was transmitted through Mr. Greason.

Q. From whom in the first instance?

A. I infer through the Commissioner.

Q. Do you know what the Act provides as to anyone in Class 1 or 2, manufacturer or wholesaler, as to how long they have to keep their records?

A. All the records, I understand, are required to be kept two years.

Q. And when you went into the Direct Sales office, records were produced from 1934 with respect to Dr. Tate?

A. Yes, sir.

Mr. Mahoney: That is all.

Redirect examination.

By Mr. Doyle:

Q. Just one more question.

The Court: Is it in reply to anything that was brought out?

[fol. 241] Mr. Doyle: No, sir.

The Court: Unless it is absolutely necessary, we have to stop it somewhere

Mr. Doyle: I am not going into a lengthy examination.

Q. All of the narcotics these witnesses testified they bought, was it turned over to you?

A. Yes, sir.

Mr. Mahoney: Objection.

The Court: Exception allowed.

A. All turned over to me with the exception of a sample turned over to Mr. Lanigan. Mr. Lanigan and I marked it

together and he took it to Atlanta. All the others were turned over to me and after they were marked by Mr. Rogers and myself and the informer, I sent them to the chemist in Atlanta, Mr. Holman.

Witness leaves stand.

Scott W. Holman, a witness produced on behalf of the United States, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Doyle:

Q. Mr. Holman, you are a chemist in the Atlanta office of the Bureau of Narcotics?
A. Yes, sir.
Q. You heard Mr. Weatherwax' testimony a while ago?
A. Yes, sir.
Q. Did you get those narcotics?
A. Yes, sir.
Q. What were they?
A. Morphine sulphate.

Mr. Doyle: That is all.
[fol. 242] Mr. Mahoney: No questions.

Witness leaves stand.

After instructing the jury, the Court announces a recess until two o'clock, p. m., at which time the trial is resumed.

Mr. Doyle: Your Honor, the next exhibit we have to offer is in about five packing cases in my office. Mr. Mahoney examined them last night and we just want to present a sample and introduce all the records.

The Court: Any objections?

Mr. Mahoney: As to the exhibits, I am in perfect accord that they have the records which are our records which we filed with the Collector and were sent to Washington. However, our objection, the same as to some of the other exhibits, is this. The purpose at this time is not stated as to why they are offered. I don't know the years that the

District Attorney intends to offer, but I assume that he intends to offer them for the same years evidenced by the photostatic copies of the orders.

The Court: Is that what it is?

Mr. Doyle: Yes, sir.

Mr. Mahoney: If he offers them in keeping with that from 1934 to 1940, my objection at this time is as to their competency. My objection is that they are incompetent, because this indictment alleges particular dates. There is no overt act alleged that would show a conspiracy between Dr. Tate and the Direct Sales except up to and including June 16th, 1939. They are our records and I raise no [fol. 243] question as to their authenticity, because if we had not filed them we would have been indicted in New York years ago.

The Court: I see. Your objection is as just stated. You concede that all these exhibits are in evidence?

Mr. Mahoney: My objection is to them in their entirety, as a whole, but just keeping in mind those dates subsequent to June 16th, 1939.

The Court: The Gentlemen is objecting, Mr. Doyle. If you will give your attention, I will appreciate it. I am trying to rule upon this objection. I cannot do so without your assistance and without your telling me for what purpose you are offering and what exhibits you are offering.

Mr. Doyle: The law requires them to make and they have made monthly reports of their sales of narcotic products that they sell, the name of the person to whom sold and the amount, and that goes forward on a monthly consolidated report.

The Court: What are you offering?

Mr. Doyle: I am offering those reports.

The Court: Which reports?

Mr. Doyle: Their monthly reports to the Bureau.

The Court: Of sales to whom?

Mr. Doyle: Sales to everybody that they have made, including Dr. Tate, on Forms 810 and 811. Those are the numbers of the official forms.

The Court: What about sales to everybody? How would that be competent as against these people?

Mr. Doyle: Well, on this point, your Honor. We have this testimony from Dr. Blake, which has been admitted.

The Court: I understand that, but what you are intro[fol. 244] ducing—is a conspiracy alleged between these

people and some other people say in California? What has that to do with this case?

Mr. Doyle: Dr. Blake testified as to codein. Now, by these records we maintain to show that the company is making a tremendous amount—It is rather hard to argue before the jury.

The Court: Gentlemen, go to your room. The jury retires.

The Court: I would like to know just what you are offering. You say you have a sample. I would like to see it.

Mr. Doyle: We will go upstairs and get it.

The Court: I thought you said you had it here.

Mr. Doyle: I am not trying to wast- time. I have had long distance calls and I had only an hour.

The Court: All right.

Mr. Mahoney: This will save a little time. There is one from our files. That is for one month, which is the original of a duplicate original which we sent to the Collector of Internal Revenue at Buffalo, who in turn sent it to Washington. (handing to counsel.)

The Court: Just tell me what it is.

Mr. Doyle: Well, sir, it is on Form 810. There is a list; the date, the number of the order form, the doctor who presented it, the amount of the order, and the date it was shipped to him. Now, there is a part of this report, also. It is on the "C" Form. It is their production report. The report of all of that over this period of the indictment will show what their production of narcotics was.

[fol. 245] The Court: You are offering, in addition, the amount sold to other doctors. Have you got a record to show the amount of morphine produced in a certain number of years?

Mr. Doyle: Yes, sir.

The Court: What is your objection to that, Mr. Mahoney?

Mr. Mahoney: For the reason, your Honor, that it is not competent because of the exhibits already in evidence as to the ceiling in reference to production. Some of the exhibits in evidence show that it is not the purpose of the Department to fix the amount or price.

The Court: What do you say, Mr. District Attorney?

Mr. Doyle argues to the Court.

The Court: In other words, you are just offering this for the purpose of showing the proportion between the

amount of codein that they sell and the amount of morphine that they sell as one circumstance to prove the agreement?

Mr. Doyle: That is right, and for the purpose to prove that from the nature of their business they would be more likely to make such agreement.

The Court: I have my serious doubts about it, Mr. District Attorney.

Mr. Doyle further argues to the Court.

The Court: I am going to admit it.

Mr. Mahoney: May I be heard?

The Court: I have my serious doubts about its competency, but if the Government insists upon its admission, I am going to resolve that doubt in its favor and let it come in.

Mr. Mahoney: Your Honor, I can cite this reason. Dr. [fol. 246] Blake, with all due respect, is a capable and competent practitioner in Greenwood, but his administering to patients in Greenwood is no criterion as to what other doctors are prescribing in 48 States of the Union.

The Court: I really don't see where it throws any light to amount to anything on the case, but it might be a circumstance. I have my serious doubts as to its competency, but I am going to resolve it for its admission. An exception is taken and allowed.

Mr. Mahoney: Did I understand that an exception is allowed?

The Court: Yes, sir, an exception is taken and allowed.

Monthly reports of production and sales filed by Direct Sales Company, Inc., with the Collector of Internal Revenue, Buffalo, New York, hereinabove referred to, are admitted in evidence in a group as Government's Exhibit #14.

Mr. Doyle: I want to introduce the catalogues of Sharpe & Dohme and Parke-Davis. You agree that, as far as the catalogue is concerned, it is true? (Addressing counsel)

The Court: I don't think that is competent, Mr. District Attorney. I have gone a long way with you in resolving the doubt in your favor, but I don't see how another man's catalogue would be competent.

Mr. Doyle: The only thing, Mr. Mahoney asked Dr. Tate about other companies and one of these is one he mentioned, and he said others.

The Court: Certainly, and he went ahead and told about the different prices. What do you want to introduce this for? Sharpe & Dohme I know, as a matter of fact, sell by agents. That is in evidence. What else do you want to show?

[fol. 247] Mr. Doyle: The comparative prices.

The Court: That is all in evidence.

Mr Doyle: And the manner of listing them.

The Court: What difference does that make whether Sharpe & Dohme lists them one way and this man another?

Mr. Doyle: I won't insist on it.

Mr. Mahoney: On that offer my objection is sustained. so the record will show?

The Court: Yes, sir.

Mr. Doyle: Your Honor, you are a better lawyer than I am, and if you say so I will withdraw it.

The Court: Let the record show that the District Attorney withdraws his offer as evidence of certain records of the concerns.

The offer as evidence of statements showing manner of listing and comparative prices is withdrawn by the District Attorney.

A short recess is taken, after which the trial is resumed.

The Court: i have permitted counsel for the defendant to make a motion for a directed verdict of not guilty and reserve the right to put up evidence in the event I overrule the motion.

MOTION FOR DIRECTED VERDICT AND RULING THEREON

Mr. Mahoney: If your Honor please, at this time we move for a dismissal of the indictment and discharge of the defendant——

The Court: In this district you move for a directed verdict of not guilty.

Mr. Mahoney: —on the grounds that the Government [fol. 248] has failed to make out a prima facie case of the violation of Section 37 of the United States Code, commonly known as a conspiracy, and which we understand as a conspiracy to violate Sections 1 and 2 of the Harrison Narcotic Act. (Argues on motion).

The Court: I am going to take this motion under advisement. I want to study it for some time. I reserve my

decision on the motion at this time and you may renew it on the conclusion of the testimony.

[fol. 249] Miss Ruth Gertz, a witness produced on behalf of the defendant, Direct Sales Company, Inc., having been first duly sworn, testified as follows:

Direct examination.

By Mr. Mahoney:

Q. Miss Gertz, what is your connection with the Direct Sales Company?

A. I am the manager of the office, the laboratory office.

Q. Of the Direct Sales Company?

A. Yes, sir, that is right.

Q. A defendant in this action?

A. Yes, sir.

Q. You have been connected with the defendant corporation how long?

A. About fifteen years.

Q. What are your duties in connection with the laboratory office of the Direct Sales Company?

A. I am in charge of the office. I oversee all the narcotic reports and all the other reports, and also I work in the front office at times. I have worked over there, and I work in conjunction with the other office.

Q. Are you familiar with the routine of the Direct Sales Company upon receipt of a narcotic order from a physician or druggist on the outside?

A. Yes, sir, I have worked on the orders.

Q. I show you a copy of a triplicate narcotic form, together with two other forms, and ask if you will explain to the Court and jury what they represent in connection with a narcotic order of the defendant corporation. (handing to witness)

A. Why these three copies represent the invoice on an order after it is received. After the narcotic blank is [fol. 250] checked—Do you want me to——

Q. I want you to tell this Court and jury the procedure.

A. Upon receipt of a narcotic order, we look in the file which they have mentioned previously and take his card out. If he is on the black list, it is also in the file. If we do

not find a card in the file, we again check the list furnished by the Government, that is, the black list. That is just a double check so there will not be a slip-up there, because the Government requested it. If the card is taken out and is not marked, "No narcotics", and he is not on the black list, the order is given to this girl who is called a checker. First she checks the blank to see if it is filled in properly by the doctor. She checks his number checks the name of our company and our address, and she checks to see if it is signed properly. She checks the item to see if it is made out with the proper grainage and the name of the item. She also checks the name that is stenciled on there or typed on by the Government of the doctor. She checks that name to see if that is all proper and that the Collector has filled in his space properly, and after the blank is passed on and seen that it is all in good order, it is then given to the invoicer.

Q. What goes to the invoicer after those checks are made?

A. After the checks are all made, this form, together with the Federal narcotic order blank. This is what we call an order blank, and this is sent to the doctor with our catalogue and he specifies in here the same thing that is on the Federal narcotic order blank, and after that the Federal narcotic order blank is given to the invoicer and this girl types it. On this there is a green copy, a yellow copy, and [fol. 251] a white copy. She types the item out here according to the catalogue number, the quantity and amount, and also specifies on there the narcotic order number which is on the doctor's blank. After she invoices it she puts it in the basket and it goes to another girl we call the re-checker and she re-checks it. When she re-checks that invoice, she keeps a white copy there.

Q. Where is there?

A. In the front office, together with our card that we spoke of. She lays that a*is*-e. She pins that together, the narcotic blank and the doctor's order, she pins that together and also attaches this narcotic check sheet.

Q. Does that check sheet designate narcotic on it?

A. Yes, it says, "Narcotic check sheet", and she pins that on the order to identify it as a narcotic order when it goes to the other part of the plant. After it has been checked and is o.k., it is sent to the laboratory office that I am in

charge of and we deduct the amount of whatever the item is from our perpetual inventory.

Q. Inventory of what?

A. Of our narcotic account.

Q. That being a narcotic sheet and a narcotic order, you deduct it from the narcotic account?

A. Yes, sir.

Q. All right, carry on.

A. Then the order is sent to the shipping department. Mr. Miller is in charge of that department. He takes whatever narcotic is specified out of our safe and makes his entry on this narcotic check sheet and also on the Federal narcotic blank as to the quantity sent and the amount of [fol. 252] stamps that are on the bottle, and an entry is made directly on the Federal narcotic blank of the doctor. Then this green invoice has a perforated part at the top. When it is packed that invoice is put on the inside and this on the outside for shipping. After the order is shipped, this part comes to me in the laboratory office and the Federal narcotic blank comes to the office to me, and then I check on this check sheet that was filled in in the shipping department and I compare the three just to make certain that everything was sent out correctly. Then the yellow invoice and the doctor's blank are sent to the front office to file for reference there and this check sheet is filed away for reference. An inventory is taken on the 15th. day of the month and the last day of the month.

Q. Let me have those a moment, please.

Mr. Mahoney: At this time, I offer them all in evidence as one exhibit.

Mr. Doyle: No objection.

The blank narcotic check and invoice sheets, as hereinabove identified and referred to, are admitted in evidence as *Defendants' Exhibit #21.*

Mr. Mahoney:

Q. What particular part of Defendants' Exhibit #21 is eventually retained in your office after the order is filled and shipped?

A. This narcotic blue check sheet.

Q. That is kept in your office?

A. Yes, sir.

Q. Miss Gertz, you are familiar with the provisions of the Harrison Narcotic Act relative to the report to be made by the corporation?

A. Yes, sir.

Q. What does that particular work in connection with the [fol. 253] Direct Sales Company's reports pursuant to the Narcotic Act?

A. I do that work.

Q. How often is it necessary that that be done under the Act?

A. Once a month.

Q. What portion of the month must your report be in?

A. By the 15th of the month.

Q. To whom is that made?

A. To the Buffalo office of the Collector of Internal Revenue.

Q. It is prepared by you?

A. Yes, sir.

Q. It is executed by an officer of the corporation?

A. Yes, sir.

Q. In each and every month through the years designated here was each sale made to Dr. Tate reported to the Collector of Internal Revenue?

A. Yes, it was. Every sale made was reported.

Q. In writing?

A. All typewritten reported.

The Court:

Q. Reported to the Collector of Internal Revenue where?

A. At Buffalo.

Q. You don't make a report to the State where it is sent to?

A. No, sir.

Q. The law doesn't require that?

A. No, sir, it doesn't.

Mr. Mahoney:

Q. Now, I show you a card and ask you if you are familiar with that card or one of its type? (handing card to witness).

A. Yes, I am very familiar with this card.

[fol. 254] Q. What type card is that?

A. This is our method of keeping bookkeeping records for every doctor that is a customer of ours.

Q. Is one card maintained for each doctor?

A. Yes, it is.

Q. And the files of the Direct Sales Company include how many doctors?

A. I believe it is 14,400.

Q. And there is a card for each doctor?

A. That is right.

Q. Now, after the receipt of this first black list from Mr. Bransky, that was dated August 12th, 1936, Government's Exhibit #5, what was done by the Direct Sales Company relative to its filing system as to doctors?

A. Upon receipt of the black list, as they call it, we went through our files and compared the black list with our cards. If the name was found, it was compared. If there wasn't any card in our files as having bought from us, we made out a card for that doctor, stamping it, "No narcotics", for that doctor, so there is a card in the file for every one on the black list.

Q. So even if there was no card according to the list submitted by Mr. Bransky or the lists that came from Mr. Anslinger's office, even if there was not a card, a card was made out for him?

A. Yes, sir, it was.

Q. And it was placed in your file?

A. Yes, sir.

Q. With the designation, "No narcotics", on it?

[fol. 255] A. Yes, sir.

Mr. Mahoney: I will offer that in evidence.

Card labeled, "No narcotics. Commissioner of Narcotics, Washington, D. C.," hereinabove identified and referred to, is admitted in evidence as Defendants' Exhibit #22.

Q. Now, you know there is a provision in this Act that these monthly reports must be made out?

A. Yes, sir, I do.

Q. And, of course, in the position that you occupy, making them up each and every month, you are in contact with the inspector in charge of the Buffalo office?

A. Yes, sir.

Q. And that is the district in which the Direct Sales Company is located and to which it must make reports?

A. Yes, sir.

Q. Did there come a time when you were contacted by the inspector of the Buffalo office to make additional reports?

A. In 1937, in July, the district inspector came in the office and went into the files and went over the doctors who had purchased 500 grains or over, and he requested us at that time that we make out a form and give him this information for every day that such orders came through, in order that he wouldn't have to come into the office and take this record himself.

Q. Did he tell you at that time that it was compulsory under the law?

A. He just requested it.

Q. He didn't say it was compulsory?

A. No, sir.

Q. You were never notified that it was compulsory?

[fol. 256] A. No, sir, I wasn't.

Q. You have since found out that it was not compulsory?

A. Yes, sir I have.

Q. Did he suggest the making up of a form, or did he furnish you a form of the Government?

A. No, sir.

Q. In regard to the form, who had to bear the expense of making up this weekly report suggested by Mr. McKenna?

A. The Direct Sales Company.

Q. Did you make up weekly reports and have you made such reports since that time that he requested it?

A. Yes, sir.

Q. And you sent them in to the Buffalo office?

A. No, sir, to the New York office in an envelope furnished me by the inspector in Buffalo.

Q. At the time, he didn't have a form and the company printed a form?

A. Yes, sir.

Q. At the time he requested it, did he furnish you envelopes of a particular type?

A. Yes, sir, he did.

Q. When he furnished the envelopes, did he tell you what to do with the weekly report of anyone purchasing 500 grains or more?

A. Yes, sir, he just told me to make the report and send it in in this envelope every week.

Q. And from the time he made the request up to and including sometime in May, 1940, did you send in each and

every week the name of Dr. Tate in those weeks when he was purchasing 500 grains or more?

[fol. 257] A. Yes, sir, he was on many reports. I noticed his name on many reports.

Q. I notice this has on it, "District Supervisor, Bureau of Narcotics, Federal Office Building, Vesey and Church Streets, New York, New York."

A. Yes, sir.

Mr. Mahoney: I offer that in evidence.

The Treasury Department franked envelope, hereinabove identified and referred to, is admitted in evidence as Defendants' Exhibit #23.

Q. And do you know that this office is immediately over that of Mr. McKenna?

A. Yes, sir.

A. Yes, sir.

Q. Now, you say that after this request was made for weekly reports, which you complied with from 1937 on, the envelope was given you by Mr. McKenna?

A. Yes, sir.

Q. Then I show you a communication dated May 5th, 1941, coming from Mr. Artis, who is acting district supervisor. Did he succeed Mr. McKenna?

A. No, sir, he is from New York.

Q. Did your company receive that particular letter from him?

A. Yes, they did.

Q. And in it was there a form?

A. Yes, sir, there was a form N-63.

Q. There were a number of those enclosed?

A. Yes, sir.

Q. Is that the form then that the Government provided [fol. 258] as a substitute for what you had been sending them since 1937?

A. That is correct.

Q. For the reporting of weekly sales?

A. Yes, sir.

Mr. Mahoney: I offer that in evidence.

Mr. Doyle: No objection.

Letter from R. W. Artis, Acting District Supervisor, Bureau of Narcotics, New York City, to Direct Sales Com-

pany, Inc., dated May 5, 1941, referring to enclosure of supply of Form N-63, together with blank Form N-63, hereinabove identified and referred to, is admitted in evidence as Defendants' Exhibit #24.

Mr. Mahoney:

Q. Now, Miss Gertz, in showing you Government's Exhibit #3, what is that to begin wi' 1?

A. Well, this is one of our narcotic blanks which was issued to Dr. Tate for a shipment of 982, which was one-half grains morphine sulphate, 1000 tablets, which was returned to us by the postoffice as he didn't accept the shipment.

Q. And to what does it refer, what particular shipment or order of Dr. Tate?

A. It was the May 24th order of Dr. Tate.

Q. I show you Defendants' Exhibit #1, dated May 24th, 1940, and ask if that was the purchase order received?

A. Yes, sir, that was the order received.

Q. And subsequent to that, did you dictate that letter of June 17th to Dr. Tate relative to Defendant's Exhibit #1?

A. Yes, I wrote that letter.

Q. You wrote the letter?

A. Yes, I did.

Q. And was it after the corporation had *had* returned [fol. 259] to it the package from Dr. Tate at Calhoun Falls?

A. Yes, sir.

Q. Now, I show you Defendants' Exhibit #3, a letter dated July 2nd, 1940. On the date that that letter was dictated at the Direct Sales Company, had you received a reply to yours of the 17th instant to Dr. Tate?

A. No, we had not—we generally keep them fifteen days, and then I wrote this second letter.

Q. Subsequent to writing the second one, did you receive the letter of June 17th with that designation below?

A. Yes, I did.

Q. Now, what was the purpose of the order blank that you made out to Dr. Tate?

A. It is required by the Narcotic Bureau of the Government that we keep a record and report it on our monthly narcotic forms of all returned items, and according to that

we must make out a blank for every return and report that item on our monthly report.

Q. When you received Dr. Tate's reply in July, 1940, pursuant to your letter of June 17th, had you already reported to the Federal Government relative to the sale of 1000 half-grains to Dr. Tate pursuant to that order?

A. Yes, sir that was reported.

Q. And, in order to comply with the requirements of the Narcotic Bureau at the Buffalo office, it was necessary for you to send this order to Dr. Tate?

A. Yes, sir, it was.

Q. And was that reported?

A. Yes, sir, it was on the July report.

[fol. 260] Q. And I show you also a returned goods item, and ask if you are familiar with that and made that out?

A. Yes, sir, I made that out.

Q. Was it made out in conjunction with the receipt of Dr. Tate's returned order?

A. Yes, sir, immediately upon its receipt I made that out.

Mr. Mahoney: I offer that in evidence.

Memorandum headed, "Returned Goods," showing receipt of goods returned by Dr. Tate, hereinabove identified and referred to, is admitted in evidence as Defendants' Exhibit #25.

Mr. Mahoney: That is all.

* * * * * * *

Cross-examination.

By Mr. Doyle:

Q. Miss Gertz, were you there in the office of the company when Mr. Bransky was there?

A. I was employed by the Tonawanda Drug Company, which was owned by the Direct Sales Company.

Q. Was it doing the same nature of business as this?

A. Exactly.

Q. Are you an officer of the company?

A. No, I am manager of the laboratory office. I am not an officer.

Q. When you say laboratory—I want to understand, is that the laboratory that manufactures all the pharmaceuticals that you handle?

A. Yes, sir.

Q. In other words, you don't have one in charge of the narcotic laboratory and somebody else in charge of the other?

A. We only have two offices; the front office which [fol. 261] handles all the business in connection with the orders, and the laboratory office which handles all the business in connection with the manufacturing

Q. Who is the manager of the company? I understand that Mr. George J. Dotterweich is president. Is he likewise manager?

A. What do you mean; of the manufacturing?

Q. Does he fix the policies of the company?

A. Yes, sir, he does.

Q. He is there in charge all the time?

A. Yes, sir.

Q. As far as people like you are concerned, you do what he says?

A. Yes, sir.

Q. And follow the procedure he outlines?

A. Yes, sir.

Q. And if a question comes up about how to handle matters, you go to him?

A. Yes, sir.

Q. And that is Mr. George J. Dotterweich over there, isn't it?

A. Yes, sir.

Q. When you say you had 14,000 customers, do you know, being in the laboratory, how many customers you have for narcotics?

A. No, I don't know.

Q. I want to question you about this form, Defendant's Exhibit #24, where you report those sales, which was just shown you a while ago. This note on the bottom of the form, "List all sales of the above drugs amounting to one ounce or more in the case of cube, powder, crystal, or similar form; or to 500 grains or more in the case of tablets, ampoules, [fol. 262] or other single dose units. Being in the laboratory, you would know that one ounce is 437 grains?

A. 437½ grains.

Q. What they want you to report is unusually large quantities?

Mr. Mahoney: I object to that as calling for a conclusion.
The Court: Objection overruled.
Mr. Mahoney: Exception.
The Court: Exception allowed.

Mr. Doyle:

Q. You are not required to report on those not named there?
A. No, sir.
Q. These order forms must be kept two years?
A. Yes, sir.
Q. As a matter of practice, you keep them a good while longer?
A. Yes, sir.
Q. And you know an inspector always has the right to come in and see them?
A. Yes, sir.
Q. And that is what you keep them for, in accordance with the law?
A. Yes, sir.
Q. And if an inspector comes in, there is nothing suspicious?
A. No, sir.
Q. You heard Mr. Mahoney cross-examine Mr. Weatherwax?
A. Yes, sir.
Q. And he said Mr. Weatherwax deceived them?

Mr. Mahoney: I object. I didn't say that.
The Court: Well, you did state that you objected to [fol. 263] the manner by which he obtained them.

Mr. Doyle:

Q. He did nothing more than the law required?

Mr. Mahoney: I object to that.
The Court: Well, she can say if she knows.

A. Yes, sir, but he asked for the photostatic copies, and that was a little bit unusual.

Mr. Doyle:

Q. Doesn't that happen often?
A. No, sir, they never have asked for that before.

Q. Well, then these peoples who sell these things are tried on charges of going out and obtaining these things, doesn't the Government produce photostatic copies?

A. No, they have always subpoenaed a representative with the original blanks.

Q. What is the name of that man?

A. Mr. Rich.

Q. He is on the road a considerable portion of the time testifying?

A. No, sir, maybe once a year and maybe not that.

Q. Isn't that his principal business to go out with the order forms and testify in cases?

A. No, sir, he works for the company.

* * * * * * *

Redirect examination.

By Mr. Mahoney:

Q. What is Mr. Rich's business with the company?

A. He is the receiving clerk.

Q. Is he a truck driver also?

A. Yes, sir

[fol. 264] Q. He drives a truck for the company?

A. Yes, sir, he does.

Q. And you say maybe once a year he goes out and testifies with the original order form?

A. Yes, sir.

Q. Do you recall Mr. Weatherwax coming there and calling for the order forms?

Mr. Doyle: I object. It is leading.

Mr. Mahoney:

Q. Did he come there?

A. Yes, he did.

Q. Did he have a conversation with you?

A. Yes, sir.

Q. About photostating the narcotic order forms?

A. Yes, sir.

Q. What did he say he wanted those photostats for?

A. He asked us about them and we asked why he was taking photostatic copies, because it was unusual, and he said it was in order to prevent sending a witness down with the blanks; that they were going to take photostatic copies and

it would save quite a bit for the Government in not taking a man down and by taking these copies.

Q. And you assigned Mr. Rich to take him to make these photostatic copies?

A. Yes, sir.

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Recross-examination.

By Mr. Doyle:

Q. When you are subpoenaed to produce records, the subpoena is for the custodian of the records, the person in [fol. 265] charge of the records, to testify to them?

A. Well, I imagine it is.

Mr. Mahoney: I object to what her imagination is.

A. I never actually saw the subpoena myself.

Mr. Doyle:

Q. And you would send the truck driver with them?

Mr. Mahoney: I object to that. She said she never saw the subpoena.

The Court:

Q. When subpoenaed, who received the subpoena?
A. The Direct Sales Company.
Q. Did they subpoena the corporation?
A. The corporation I reckon.

Witness leaves stand.

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After instructions the jury, the Court announces a recess until tomorrow morning.

• • • • • • •

Court convenes on November 13, 1942, at ten o'clock, a. m., at which time the trial is resumed.

George J. Dotterweich, Jr., a witness produced on behalf of the Defendant, Direct Sales Company, Inc., having been first duly sworn, testified as follows:

Direct examination.

By Mr. Mahoney:

Q. Mr. Dotterweich, what office do you hold in the Direct Sales Company, Inc.?

A. President of the company.

Q. And you have been president of that company since when?

A. September 1st, 1936.

[fol. 266] Q. And prior to September 1st, 1936, what office did you hold?

A. Treasurer.

Q. And who was president at that time?

A. My brother, Joseph H. Dotterweich.

Q. And did he sever his connection with the corporation?

A. He did on August 26th.

Q. 1936?

A. Yes, sir.

Q. And at the present time what is his business?

A. He is a competitor of mine in the same line of business.

Q. And has he been a competitor since severing his connection with your company?

A. Yes, sir.

Q. What is his company?

A. Buffalo Pharmacal Company.

Q. Mr. Dotterweich, have you any relatives in Germany?

A. No, I have not.

The Court: Well, as far as this Court is concerned, I will instruct the jury that that has nothing to do with this case.

Mr. Mahoney: Thank you, your Honor. That was injected by Mr. Bransky.

The Court: It doesn't make any difference about that, Gentlemen of the Jury. That has nothing to do with this case.

Mr. Mahoney:

Q. Did you make a visit to Germany in 1936?

A. I did early in 1936.

Q. For what purpose did you go to Germany?

[fol. 267] A. To buy empty glass ampul vials.

Q. In connection with your visit?

A. Yes, sir.

Q. And do you recall approximately when you returned from that trip?

A. About August 20th. It was on a Friday.

Q. In what year?

A. 1936.

Q. Upon arrival at the City, did you go to your plant?

A. No, I came in on the night train.

Q. I mean eventually did you go to your plant?

A. Yes, sir.

Q. Did you meet Mr. Bransky?

A. I met him on Friday, I believe, August—It was on Friday.

Q. At that time did you have some conversation with him relative to the order lots that were published in the catalogue then being used by your company?

A. Not at that time.

Q. Sometime during that period?

A. Well, before he left.

Q. Approximately when did he leave; do you recall?

A. It was about September 14th or 15th; somewhere along there.

Q. Of the same year?

A. Yes, sir, 1936.

Q. The substance of that conversation let us just narrate to jury.

A. As Mr. Bransky left he came to my office with Miss Hyatt, and in talking over other things he suggested that I drop the 5000 price from our catalogue. I told him at that time that we had had it there to conform with our other [fol. 268] tablets appearing in the catalogue and that everything had been listed in hundreds, thousands, and five thousands, but I told him I would drop it.

Q. And that was the substance of the conversation. Is that right?

A. It was.

Q. And as a result of that, Mr. Dotterweich, was a new catalogue prepared?

A. It was, shortly afterwards.

Q. How do you have your catalogues printed?

A. Well, from electrotype plates.

Q. Yes, sir, but where are they printed?

A. In our own plant.

Q. You have a printing plant in connection with your business?

A. We do.

Q. In order to make changes in your catalogue, what is necessary?

A. Well, we have to reset the type and make new plates.

Q. Do you have the plates or do you order those?

A. We have to buy those.

Q. Did you have to make a new plate in regard to the 5000 lot price that Mr. Bransky suggested that you drop?

A. Oh yes.

Q. What do they cost?

A. About $4.00 a plate.

Q. What about the catalogues that had not been distributed having the 5000 feature?

A. We destroyed those.

Q. You eliminated the 5000 so far as the catalogues were [fol. 269] concerned?

A. Yes, sir.

Q. Now, Mr. Dotterweich, did you have a further conversation with him in this period, from the time you returned and met Mr. Bransky in your plant until he left, concerning the quantity, that is, the quantity that should be dispensed?

A. Yes, he gave us a list, that is, gave it to Miss Hyatt and myself.

Q. Well, did you have a conversation with him?

A. Yes, sir.

Q. Would you narrate the substance of that conversation to the Court and jury?

A. Yes, the limitation was placed of 5000 tablets to hospitals, 3,000 to druggists, and 1000 to doctors.

Q. And that was to apply to what?

A. To morphine sulphate.

Q. To any one order?

A. To any one order.

Q. Now, after that conversation that you had with Mr. Bransky, in showing you Government's Exhibit #14, is that the schedule that was made up pursuant to the instruction of Mr. Bransky? (referring to Defendants' Exhibit #14.)

A. Yes, and it was the schedule we were pursuing while he was there at our office.

Q. During that period of time?

A. Yes, sir.

Q. And this was typed in the office?

A. It was.

Q. And represented what Mr. Bransky had directed to [fol. 270] apply to *to* hospitals, druggists, and doctors?

A. It did.

Q. From that time and up to and including the present, has your corporation followed that?

A. We have been guided by it ever since.

Q. And at any time have you sold in excess of that which Mr. Bransky designated were the amounts to be sold on any one order?

A. No, we have not.

Q. Now, in regard to your catalogue also, have you made a trip to Washington, D. C. to the office of the Commissioner of Narcotics?

A. I did about a year or a year and a half back, as I recall.

Q. Was that the result of correspondence you had had with Mr. Anslinger regarding your catalogue?

A. I don't know whether or not. I got down there frequently on labels and label change.

Q. That is pursuant to the food and drug act?

A. Yes, sir.

Q. And that is also an act governing your business?

A. Yes, sir.

Q. And on one occasion did you have a conversation with Mr. Anslinger, Commissioner of Narcotics?

A. I went there one morning to see him and had to wait half an hour, and his secretary came out and told me he would be in conference a good while and turned me over to Mr. Wood, Mr. Will S. Wood.

Q. Did you have a conversation with him at that time in reference to the catalogue?

[fol. 271] A. I did.

Q. As a result did you make any changes in the catalogue?

Mr. Doyle: I object to that.

Mr. Mahoney:

Q. He is Assistant Commissioner?

A. Yes, sir.

Q. Subsequent to that time did you make some changes in your catalogue?

A. No—that is, we made changes practically all the time, that is, every three or four months according to conditions.

Q. In regard to discounts, did you discuss that with Mr. Wood?

A. No, sir.

Q. Did you discuss discounts with Mr. Anslinger?

A. No, sir.

Q. Did you correspond with them about it?

A. They corresponded with me about it and I told them I would make the changes.

Q. They corresponded with you?

A. They corresponded with me in late 1940.

Q. And suggested changes?

A. They suggested that we offer no discount whatever.

Q. As a result of that, did you eliminate that feature?

A. We took out narcotics out of the general listing and listed them on a separate sheet.

Q. As a result of that, did you have to make new plates again?

A. Yes, sir, we had to re-set all our pages for that.

Q. What is the number that you run in your printing plant?

A. About 140,000.

Q. Those catalogues that had not been used at the time [fol. 272] of this second revision at the suggestion of the Narcotic Bureau, what was done with those on hand?

A. I used some of them up, because Mr. Anslinger or Mr. Wood said in their letter that I could use them up.

The Court: In that connection, how often would you send catalogues to your customers?

A. About every ten days.

Q. To your customers every ten days.

A. About every ten days as a reminder.

Mr. Mahoney:

Q. And was it necessary for you to get new plates?

A. Yes, sir.

Q. And you said you had to re-set the pages?

A. Yes, sir.

Q. Now, Mr. Dotterweich, will you just describe to the Court and jury the nature of your business?

A. Well, it is a general physicians' supply mail order business, as distinct from salesmen, retail men, or middle men.

Q. And you are a registered manufacturer pursuant to the provisions of the Act?

A. Yes, sir.

Q. Also a registered wholesaler?

A. Yes, sir.

Q. And you are registered each year pursuant to that?

A. Yes, sir.

Q. Do you pay a fee each year?

A. $36.00 a year.

Q. I show you Defendants' Exhibits 7 and 8, and ask you to detail to the Court and jury the nature of your business. [fol. 273] A. The nature of our business is supplying physicians with tablets, syrups, hypodermic tablets, elixirs, ointments, fluid extracts, tinctures, bandages, and some specialties in the line of crude drugs and chemicals.

Q. And approximately how many times do you handle in your business?

A. I would say 1200.

Q. 1200?

A. 1200.

Q. And of that 1200, narcotics occupy how many?

A. I believe that 50 some-odd tablets contain narcotics, including hypodermic tablets.

Q. Now, what is the volume of your business, that is, the average that you have done in your business between 1925 or 1936 and 1940?

A. Our annual sales are between three hundred and three hundred fifty thousand dollars.

Q. A year?

A. Yes, sir.

Q. That is gross, is it not?

A. Yes, sir.

Q. And what is the percentage of the narcotic business by volume that you do?

A. About 2½ per cent.

Q. In other words, 2½ per cent of your business is in the making and distributing of narcots. Is that right?

A. Yes, sir, that is right.

Q. And the other 97½ per cent is made up of the other items?

[fol. 274] The Court:

Q. This 2½ per cent is in dollars and cents?

A. That would be in volume. It wouldn't be in dollars and cents, because narcotic tablets are more expensive.

Q. What per cent in dollars and cents would you say?

A. I have never figured it up, but I would say 15 per cent.

Mr. Mahoney:

Q. And so, in keeping with the Court's inquiry, you say in dollars and cents 15 per cent of your business is in narcotics?

A. Yes, sir.

Q. And in volume 2½ per cent?

A. 2½ per cent, due to the price.

Q. Now, do you employ any salesmen whatsoever?

A. None whatever.

Q. Can you name to the Court and jury some of the other drug companies, that is, the mail advertising phamaceutical suppliers?

A. There are three other pharaceutical mail order companies in Buffalo: the Buffalo Pharmacal Company, the Zeigler Pharmacal Company, and the Jopp Drug Company.

Q. And outside of the City of Buffalo, those you can think of.

A. The Carr Drug Company, of Muncie, Indiana, and William A. Douglas, of Memphis, Tennessee, are those I can think of; The Mutual Pharmacal Company, of Syracuse, New York, and the Physicians' Supply Company, in Philadelphia.

Q. Those are mail order houses in the United States that occur to you at the present time?

A. Yes, sir. There are probably a good many more, but [fol. 275] those are the ones I have heard more or less of.

Q. And they are competitors in your field?

A. Yes, sir.

The Court:

Q. How many did you say there are?

A. Well, about seven that I know of.

Q. Have you heard of any more?

A. I may have. Sometimes they pop up and pop out again. We are the largest of the drug mail order business.

Mr. Mahoney:

Q. How does your business compare with Sharpe & Dohme, Parke-Davis, Eli Lilly, and others?

A. Well, we have no branch houses or wholesale connections; we have no middle men, no retail men.

Q. And are you familiar with the difference in the operating costs of houses of the type of Parke-Davis?

A. I am.

Q. That is, the differential in the operation of their houses and the drug mail order houses?

A. I would say 35 to 40 per cent.

Q. Their cost of operation is 35 to 40 percent greater than mail order houses of your type. Is that correct?

A. Yes, sir.

Q. Is that the reason you are in position to sell cheaper to physicians througout the country.

A. It is.

Q. Now, in regard to Dr. Tate, when did you first see Dr. Tate?

A. Tuesday morning.

Q. Of this week?

A. Yes, sir.

[fol. 276] Q. And that was in this courtroom?

A. That is right.

Q. When was the first time you ever had called to your attention the name of Dr. Tate?

A. When we received the indictment last May, 1941.

Q. In May?

A. I think it was May. It may have been June.

Q. Do you recollect that it was in July when the Marshal served it on you?

A. Yes, I think it was now. I have really forgotten.

Q. And you were served with a copy of this indictment by the United States Marshal, Buffalo, New York?

A. Yes, sir, and it was served on my son. I didn't get it personally.

Q. And it was turned over to you?

A. It was served on my son.

Q. And turned over to you?

A. Yes, sir.

Q. And that was the first time you heard the name of Dr. Tate?

A. That is right.

Q. Had you ever had any contacts with him other than the fact that the indictment was turned over to you in July of this year?

A. None whatever.

Q. Had you ever authorized anyone to approach Dr. Tate?

A. No, sir, I had not.

The Court: You say you never heard of Dr. Tate. Had any of this orders come to your personal attention?

A. No, sir, they did not.

[fol. 277] Mr. Mahoney:

Q. Now, Mr. Dotterweich, you heard Mr. Bransky on the stand yesterday or the day before, did you not, testifying?

A. I did.

Q. And did you hear him testify in substance that he told you that in his experience he had found that any doctor that was buying in excess of 200 to 400 half grains of morphine sulphate tablets a year, that it could be presumed that he was purchasing in violation of the law?

A. He did not.

Q. He had no such conversation with you whatsoever?

A. No, sir.

Q. At the time that you arrived at your office, Mr. Bransky was already located there, in 1936, inspecting your records?

A. He had been there already a week.

Q. And from the time that you came in there up to the time he left, did you cooperate with him at all times?

A. I did.

Q. He had desk space in your office?

A. He did.

Q. And had access to your records?

A. Yes, sir.

Q. And was it called to your attention when you came in there that all narcotic orders being received by your company were being placed on Mr. Bransky's desk for inspection?

A. Yes, sir.

Q. And did you see his desk with such orders on them?

A. I did.

Q. And did you know when you came back on August [fol. 278] 20th, to the time he left that there was no order received by the Direct Sales Company which was filled prior to the time that it passed Mr. Bransky's inspection?

A. There was not.

Q. During that time everything filled by your company passed his inspection?

A. They were all put on his desk.

Q. And do you know that he did check the records of your company for the six months from January, 1936 to June 30th, 1936?

A. Yes, sir.

Q. Now, Mr. Dotterweich, it is also represented to us that Mr. Bransky, at the time he came into the office, saw an order from your company to Mallencrodt.

A. That is correct.

Q. They are one of the manufacturers of opiates in the United States?

A. That is correct.

Q. And there was such an order was there not?

A. Yes, sir.

Q. And did you converse with him about that particular order?

A. No, I did not.

Q. You knew about it though?

A. Yes, sir.

Q. And that order had been placed by your brother?

A. Yes, sir.

Q. And upon the execution of that order, in order to comply with the provisions of the Harrison Narcotic Act, it was necessary for your corporation to report that to the Narcotic Bureau, was it not?

[fol. 279] A. Yes, sir.

Q. In order to purchase it?

A. Yes, sir.

Q. And the order that he saw in there?

A. It was a blanket order to be taken as needed.

Q. To be taken as needed?

A. Yes, sir, to be taken as needed.

Q. But, in order to make that purchase and make the withdrawal from Mallencrodt, it was necessary to fill out the narcotic blank form. Is that right?

A. Yes, sir, that is right.

Q. And before Mallencrodt could fill it, they had to have such an order from your corporation?

A. That is right.

Q. And the report of that was made to the Narcotic Bureau that is located in the City of Buffalo, New York?

A. I believe so. That was handled by my brother at the time. I presume so. That is our regular routine.

Q. That contract that you made with Mallencrodt, the terms of it as to delivery was what?

A. To be taken as needed.

Q. As needed by your company?

A. As needed by our company, and our need was 200 to 300 ounces a month.

Q. What effect did that have on the terms as to price?

A. It was 75 cents an ounce cheaper.

Q. If you bought in that amount?

A. Yes, sir, it was where we contracted to buy 5000 ounces.

Q. You knew at that time when your corporation needed [fol. 280] it and when you withdrew from Mallencrodt whatever amount of opium you did withdraw pursuant to contract, that that was reported to the Narcotic Bureau in Buffalo on your monthly reports?

A. Yes, I presume so. I didn't make out any narcotic reports myself.

Q. Now, prior to 1936, were other narcotic inspectors in your office?

A. On two other occasions.

Q. Your files and books, according to law, are open to them at all times?

A. At all times, yes, sir.

Q. And there have been other agents in who have availed themselves of their right to look over your books?

A. Yes, sir.

Q. And on each occasion they came in was this entree given them the same as Mr. Bransky?

A. Exactly the same.

Q. Have you ever been convicted of any crime whatsoever?

A. Any crime? No.

* * * * * * *

Cross-examination.

By Mr. Doyle:

Q. Mr. Dotterweich, when Mr. Bransky came there and when you got back and saw him, did he caution you about the frequent use of one-half grains?

A. He did not.

Q. He did not tell you what he testified that it is reasonable to expect or assume that half-grains in large amounts were on their face notice to you?

A. No, he did not. He probably talked to my brother about it though.

[fol. 281] Q. Of course, your brother was an officer of the company too?

A. Yes.

Q. You are not on trial yourself at all?

A. No.

Q. Now, Mr. Dotterweich, what is your conception of the purpose of the agreement that you had with Mr. Bransky to limit on one order of the physician, to limit it down to 500 grains? What do you think the purpose of that was?

Mr. Mahoney: I object to that as incompetent, irrelevant and immaterial.

The Court: Objection overruled. This is cross-examination.

Mr. Doyle:

A. Well, the purpose was to establish a limit to the amount that could be sold.

Q. Don't you think the purpose was to reduce the amount of narcotics going out, to reduce the amount they were getting so there wouldn't be the temptation of large amounts going out into unlawful channels? Wasn't that the purpose of it?

A. No, I wouldn't say that, because we don't know what happens to the tablets after they leave us.

Q. So you don't understand that that was the reason for the request?

A. It was a request to limit it to a thousand tablets. The law requires us to limit it to a thousand tablets.

Q. The law doesn't require it; you were just simply asked by Mr. Bransky to limit it to that?

A. The Department asked us several times. We took it as the law. I have to make a rule for the office, and that is [fol. 282] as far as I could go on it.

Q. You determine the policy of your company?

A. I do.

Q. You give instructions to your employees?

A. Yes.

Q. And you attend to it?

A. Yes, I have to.

Q. As a matter of fact, you give pretty strict attention to your business, don't you?

A. Yes, I do.

Q. In conversations with Mr. Bransky and in letters you got from the Commissioner, which you have already admitted in evidence, didn't you understand that the whole purpose was to encourage wholesalers and manufacturers to limit the use of these habit-forming drugs?

A. No, I did not.

Q. Well, you put in evidence these letters and I suppose saw them as they came in the office?

A. Yes, I would see those.

Q. The one of October 20th, 1936, your Exhibit #20, directed to you, "In connection with its policy of restricting the distribution and use of narcotics to legitimate medical purposes, the Bureau is soliciting the active cooperation of manufacturers and wholesale dealers to the end that drugs will not be furnished to practitioners who are known to have been dispensing or selling such drugs for other than legitimate medical purposes, and to the further end that such drugs will not be furnished in any case in excessive quantities." That was the purpose?

[fol. 283] A. We presumed that anybody not on the black list was o.k. We had a right to presume that.

Q. We will come to the black list a little bit later. Now, you have another letter from the Bureau along that same line, dated February 3, 1940, directed to you, as president, by Mr. Anslinger. "I am in receipt of your letter of January 30th, 1940, mailed from New York City and your catalog No. 86 mailed on the same date from Buffalo. The inclusion of Narcotic items within the 50% discount provision is still objectionable notwithstanding their exclusion from the additional 10% discount and notwithstanding any increase in the listing price. This office is not endeavoring to make narcotics cost the consumer any certain fixed amount but is endeavoring to eliminate from catalogs, circulars and general sales policies all special inducements to buy narcotics, even though such offers may also apply to other items. The obvious intent of a 50% discount offer is to stimulate purchases of the items to which it applies, and this, so far as it relates to narcotics, is an objectionable practice." So you understood, both from all the letters and from conversations with Mr. Bransky, that the purpose of limiting the orders was to limit the amount the practitioner was to get, didn't you?

A. Well, they placed a limit on it, yes.

Q. All right, now, you say you have always complied with that requirement or request?

A. I have.

Q. That is, you have complied with it to the letter?

A. I think even more than to the letter.

Q. Well, let us see if you have complied with the spirit.

[fol. 284] Mr. Mahoney: I object. That is argumentative.

Mr. Doyle: It is cross-examination.

Mr. Mahoney: But you cannot argue on cross-examination.

A. What was the question.

Mr. Doyle:

Q. To see if you complied with it in spirit.

The Court: The way to ask it is to ask what he did.

Mr. Doyle:

Q. Do you think you are complying with the stated purpose of the Commissioner when you ship a man 1000 one day and five days later ship him another 1000?

A. Yes, I think we are complying with it.

Q. Do you think you are complying when you ship him on two order forms and he gets them the same day?

A. We don't ship two lots in a day or a day apart. That is a matter of transportation. Maybe a shipment was delayed.

Q. Now, when Mr. Bransky called your attention to your listings in your catalogue of 5000, didn't he tell you that you were the only drug house in the United States making such listings?

A. I don't recall that he said that, because there are others.

Q. Did he likewise call your attention to the fact that you were the only drug house in the United States not listing the customary amounts ordered by doctors, twenties and hundreds? Did he call you attention to that?

A. I don't believe he did. I cannot recall that he did.

Q. You know that most drug houses put up these cubes in twenties and hundreds?

Mr Mahoney: I object to that, your Honor.

The Court: That wouldn't be competent. You can ask [fol. 285] if he had a conversation.

A. I know what is going on in the business.

The Court: I ruled that question incompetent. What do you want me to do with it?

Mr. Mahoney: Let it stand, your Honor.

Mr. Doyle:

Q. Your concern is a relatively small concern?

A. It is.

Q. What is it capitalized at?

A. 50,000 shares of no par value.

Q. Your volume is about three hundred to three hundred fifty thousand a year?

A. That is right.

Q. You know that Sharpe & Dohme and Lilly are very big houses?

A. They are big companies.

Mr. Mahoney: I object to that.

The Court: What is the question?

Mr. Doyle: I asked if Sharpe & Dohme and Lilly were not very big companies.

Mr. Mahoney: I object to that. I object on the ground that it is incompetent, irrelevant and immaterial as to whether or not they are big houses or otherwise.

The Court: What do you say, Mr. District Attorney?

Mr. Doyle: He has testified they are. They started making comparisons.

The Court: I think you went into it, Mr. Mahoney.

Mr. Mahoney: I didn't go into their size. What I did ask was if he knew the differential of the operation cost between theirs and other houses, and I stopped there.

[fol. 286] The Court: Well, you went on that they had salesmen, and so on; their method of operation to some extent. What is your question?

Mr. Doyle: I ask if those he mentioned and others referred to do a big business?

A. Oh, yes.

Mr. Mahoney: I object to it. It is incompetent, irrelevant and immaterial. The issue here isn't how big a business they do.

The Court: I don't think it can hurt or help, so far as I can see.

Mr. Doyle:

Q. The testimony is that while Mr. Bransky was there, you ordered 5000 ounces of morphine. Is that right?

A. We didn't get 5000 ounces, no.

Q. You went into the matter of the volume you used?

A. We bought 5000 ounces or were contracted for it to be delivered as needed.

Q. For the years 1933 and 1934, did you buy 5525 ounces?

Mr. Mahoney: I object to that, your Honor, on the grounds stated to you before; that it is incompetent, irrelevant and immaterial, and on the further ground that I have urged throughout this trial, that, just assuming for the purpose of argument that they have shown the slightest semblance of a conspiracy between Dr. Tate and the others that that is without the pale of any alleged conspiracy that took place between Dr. Tate and any of the other defendants, the first overt act proven being on June 16th, 1939.

The Court: Didn't you go into it on direct examination?

Mr. Mahoney: No, sir, I didn't go into 1933 and 1934. [fol. 287] I asked about some conversation he had with Mr. Bransky about the Mallenerodt order. That was sometime about September 12th.

The Court: What do you think about it on cross-examination?

Mr. Mahoney: I say it is incompetent, irrelevant and immaterial.

The Court: Don't you think the question would be different on cross-examination that it would if the District Attorney was trying to prove it on direct examination in chief? This witness is taking the stand that he is not guilty of the conspiracy as alleged, and why couldn't the District Attorney cross-examine him on any matter that might touch it?

Mr. Mahoney: I say that the questioning asks about matters without the pale of the alleged conspiracy.

Mr. Doyle: It is in reply, also, to his testimony that the narcotic business is only a fractional part of the business. He testified that.

Mr. Mahoney: I confined it from 1936 to 1940, your Honor, The record will show that.

The Court: What is your date?

Mr. Mahoney: It is 1933 and 1934.

Mr. Doyle: Not anything out of the scope of this indictment.

The Court: When is the indictment dated?

Mr. Doyle: It is May, 1933 until 1940, and I am only asking about things that have transpired between them.

The Court: I think it would be competent to cross-[fol. 288] examine him upon that issue, upon the statement that 2½ per cent of his business by volume is morphine sulphate and 15 per cent of his business in collars and cents is in dealing in morphine sulphate. Upon that issue alone, I will admit it.

Mr. Mahoney: Exception.

The Court: Exception taken and allowed.

Mr. Doyle:

Q. Do you know, or do you have any records of your own by which you can answer this, that in 1934 and 1935 you used 4900 ounces?

A. It is quite probable.

Q. Now, 5000 ounces, Mr. Dotterweich—just purely a matter of calculation, an ounce is 437½ grains, isn't it.

A. Yes.

Q. And, therefore, it would be 8,400,000 quarter-grains?

A. Well, they wouldn't all be used that way. Some is used in liquids and in other preparations; probably in fifty or sixty different ways.

Q. Now, if we just convert the 5000 into money as figured in your catalogue, a year's business in narcotics is about $52,000.00?

Mr. Mahoney: I object to it as incompetent, irrelevant and immaterial. If your Honor, please, he has only shown that that was a purchase in a particular year. He has got to show that it was used in that particular year.

The Court: You can examine him on that in redirect.

Mr. Mahoney: Exception, please.

The Court: Exception allowed.

Mr. Doyle:

Q. You testimony was that your volume of business was [fol. 289] $350,000.00 and your margin of profit, I believe, about 15 per cent?

The Court: No, he testified that the amount of his morphine sulphate business in collars and cents was about 15 per cent.

Mr. Doyle:

Q. Now Mr. Dotterweich, you send out, you say, your catalogues every ten days?
A. Approximately every ten days. I may run two weeks.
Q. You had 140,000 printed at one time?
A. Yes.
Q. 14,000 customers to send them to?
A. Yes.
Q. So you were revising them often; 140,000 printed at one time and sending them out every ten days?

The Court: I don't think that has anything to do with the issues here, how much it cost him, except on the issue that he was trying to cooperate with them. That is the only issue it is competent on.

Mr. Doyle:

Q. Now you sent these catalogues to Dr. Tate every ten days?
A. Yes.
Q. And thereby invited him every ten days to buy your product?
A. Well, we invite 14,000 to buy our products.
Q. I am talking about Dr. Tate.

The Court: That answers your question.

A. I would like to sell the 14,000 every ten days if I could.

Mr. Doyle:

Q. I expect so. Now, Mr. Dotterweich, why make up this catalogue in this form? It comes in folded flat in a flat envelope?
[fol. 290] A. Yes, that is right.
Q. So this doctor opens it up and the very first thing he sees that falls out and knocks him right in the eye is this pink slip? (indicating).

Mr. Mahoney: I object to that. It calls for a conclusion, unless the District Attorney was there at the time it fell out.

The Court: This is cross-examination. Objection overruled.

Mr. Mahoney: Exception.

The Court: Exception allowed. Read the question.

Reporter reads question.

A. Well, it might be. It depends on how he sees it, I suppose. I would like to have anyone see anything we put in there.

Q. That is good advertising?

A. Well, we would like to have anyone see anything we put in there.

Q. Well, aren't you inviting Dr. Tate and other doctors, trying particularly to call their attention to narcotics?

A. No, that was deleted from the catalogue after corresponding with Mr. Anslinger. He wanted narcotics to be figured at net. Before taking them out of the catalogue, I wrote Mr. Anslinger if that would be satisfactory, and he said it would be and would meet the requirements of his Bureau.

Q. You didn't send him this pink slip?

A. That is right.

Q. And he asked you not to give discounts?

A. That is right.

Q. So you just figured off the discounts and included it in the net?

[fol. 291] A. That is right. There wasn't much else I could do, I guess.

Q. Under your general heading of narcotics, morphine sulphate rather, in this catalogue, you just list one-eighth grains, with magnesium sulphate, so that in the body of the catalogue is not really your narcotic list? (showing to witness).

A. No, these are ampuls. (indicating).

Q. That is right, so the only narcotics you list are on the pink slip?

A. There are two in the ampuls, but they sell so seldom that it is really negligible.

Q. So you have it in 500 and 1000, and you have it in large letters? (indicating on slip).

A. That is right.

Q. And in small type you say you can get a hundred at a proportionate price of one-tenth plus ten cents?

A. That is right. That is a standard price.

Q. Isn't the explanation that you are after a volume from these people?

A. It is not. It is up to them to decide what they want to order.

Q. Well, you are making very attractive prices for large quantities?

A. Well, we also make a very attractive price for a hundred.

Q. Yes, if you can find it on there.

A. Oh, they all know that. That is very elementary, the way I look at that.

Q. Mr. Dotterweich, do you make some kind of a survey of your business with these doctors occasionally?

A. Well, just to keep the list corrected.

[fol. 292] Q. Well, you don't construe it, do you, that this black list furnished by the Commissioner relieves you entirely of any responsibility to obey the law?

A. I believe it did. Why is it submitted to us?

Q. The Commissioner says he is furnishing this in a spirit of cooperation with you.

A. Well, we accepted their rulings as law, that is all.

Q. And that just puts the obedience of the law on your part over into the Commissioner's lap?

A. That is as it should be. We are not supposed to police our customers. It is up to the Commissioner and his agents to keep this thing straight.

Q. In dealing with narcotics, you are dealing with a subject that is the object of strict observance of the law?

A. It is.

Q. And you know that doctors, who have been convicted of the improper use of drugs, have been convicted because of the fact that they are not using it in good faith?

A. Oh, surely.

Q. Does it arouse your suspicion when an order comes in for 1000 half-grain tablets?

A. It would not arouse it, because I don't know how he is going to use them. He can use them hypodermically, he can use them orally, and he could use them as medicating tablets. I know they can medicate their cough syrup with it.

Q. The only way he can get rid of that morphine is by personal administration?

A. Yes.

Q. He cannot sell it. The law does not permit him to sell [fol. 293] it or give it away?

A. I have never read it that way. If he gives an injection and doesn't get paid for it, I would think he gave it away.

The Court: What the District Attorney means, he cannot take a bottle of tablets and give it to somebody.

A. No, I understand that.

Mr. Doyle:

Q. So it resolves itself down to the question that you know there is only one way in the world he can get rid of this morphine and that is by personal administration?

A. Yes, using it himself.

Q. Now, then, you likewise know what the usual, customary and standard doses are, don't you?

A. Well, that is a matter of opinion.

Q. Well, you heard the opinion of the doctors?

A. Well, that was his opinion. We have heard opinions of other doctors. In using morphine, the patient builds up an immunity to it and he can stand more later.

Q. Lots of those doctors have been convicted, too?

Mr. Mahoney: I object. That is improper cross-examination.

The Court: Well, I don't think I would go into that. That is more or less argument, so far as that is concerned. I think what the witness means is this; that since doctors are permitted under the regulations to administer morphine in doses to incurables such as those having cancer, and so forth, the more they give them the bigger dose they have to give them in the course of time to alleviate their pain.

A. Yes, it is cumulative, you might say.

[fol. 294] The Court: That is what I think the witness means.

Mr. Doyle:

Q. Now, Mr. Dotterweich, how would you figure there are enough hours in a day for Dr. Tate to administer 400 standard doses a day? Administer it, now, for that is the only way he can do it.

Mr. Mahoney: I object to that, your Honor.

The Court: Objection overruled. Exception allowed.

Mr. Doyle:

Q. How do you figure that?

A. Well, it depends on how he is going to administer them. As I said before, he may use them in making a gallon of cough syrup. If he wanted to put three-tenths of a grain per ounce, which would be under number 5 exempt, a gallon of syrup would take 48 of those tablets or 96 if he had quarter-grains.

Q. So divide that into a thousand.

A. Well, White Pine Syrup, say, wouldn't last a doctor doing any practice very long. We sell lots of gallons in the South.

Q. Do you sell any at Calhoun Falls?

A. No, just the South generally.

Q. Do you know anything about Calhoun Falls?

A. I don't know anything about Calhoun Falls.

Q. You have never heard anything about South Carolina, except Charleston and Columbia?

A. They are larger cities, I assume.

Q. You would know by that that it was going to a small place?

A. Well, most of our stuff does go to small places where doctors dispense their own stuff, rather than large cities.

Q. Now, did it ever strike you unusual that this good cus- [fol. 295] tomer of yours, who was ordering at one period 4000 half-grains a month, at one period 5000, and at one period 6000, that he never ordered codein from you?

A. No; I didn't see his orders to begin with. We fill about 150 orders a day. I don't review them all.

Q. But you say you are aware of the fact that this branch of the business is strictly regulated and that you give the business close attention?

A. There are lots of things I have to give close attention.

Q. And here is a good customer, one of the best you had for morphine?

A. Well, it seems to develop so now.

Q. Well, similar things have developed a good many times with you?

Mr. Mahoney: I object to that.

The Court: I don't think that is competent in a conspiracy case.

Mr. Doyle:

Q. Let me ask this. Had not your company been subpoenaed with your order form records numbers of times?

Mr. Mahoney: I object to that because it is incompetent, irrelevant and immaterial.

Mr. Doyle: Miss Gertz went into that on direct.

Mr. Mahoney: It was on your examination.

The Court: I don't think that makes any difference, whether they have been subpoenaed or not. He is not responsible for that.

Mr. Mahoney: We cannot be penalized for cooperating with the government.

[fol. 296] Mr. Doyle: Now, he says he doesn't know what Dr. Tate is doing and there is no reason he should. If it should be shown that numbers of his other customers had had dealings in the same way and he knows they had been convicted, doesn't that put him on notice that Dr. Tate was doing the same thing?

The Court: Just because a man is summoned as a witness, that doesn't mean anybody has been convicted.

Mr. Doyle: Not at all, but it all goes back to the black list.

The Court: You are arguing that if you ask him whether a number of doctors who dealt with him had been convicted upon records in his office——

Mr. Doyle: If he knows, isn't that competent?

The Court: If you ask that question I will pass on it.

Mr. Doyle:

Q. Come to the black list. Mr. Bransky submitted that number of names on the black list?

A. He did.

Q. I believe there were 204.

A. That is right.

Q. And he said, and the letter states, that these were the ones in the whole United States who had been convicted of violations of the law?

A. Yes.

Q. Not suspected or investigated, but actually convicted?

A. Yes.

Q. And he calls your attention to the fact that your small company, comparatively speaking, that out of that entire [fol. 297] number, that 55 of them are your customers, didn't he?

A. Yes, and I would say that that would be a very small amount, because twice a year we circularize the entire country of 140,000 or 145,000. We have been picking up names and adding to our list for almost thirty years. I don't think that is a very big proportion.

Q. You don't think 26.95 per cent of all in the United States that were convicted were your customers is a big proportion, when you testified that all these other houses are a great deal larger than yours?

Mr. Mahoney: I object. He has injected here that 26 per cent and has put his question to show 26 per cent of his customers.

The Court: I understood him to say 26 per cent of the list as I understood the testimony. Isn't that correct?

Mr. Mahoney: And that 26 per cent was on his customer's side.

The Court: Well, ask the question.

Mr. Doyle: Read that.

The reporter reads the question.

The Court: What do you mean, Mr. District Attorney?

Mr. Doyle: Of the 205 names on the black list that had been convicted.

Mr. Mahoney: Exception.

The Court: Exception allowed.

A. I didn't think it was a very large percentage. In fact, I don't know today that they had been buying narcotics.

Mr. Doyle:

Q. You didn't check your records and see?

[fol. 298] A. Well, as soon as we got the black list, we took pains to see that they wouldn't get any. What is past is past. That would be just information.

Q. Was it the practice of your corporation to undertake to change the policy in any way?

A. Why certainly we changed it.

The Court: I think this examination is getting argumentative. I don't think it proper to ask the witness that. Just ask him the question.

Mr. Doyle:

Q. You answered Mr. Mahoney's question that you had never been convicted of anything. Weren't you convicted under the Pure Food and Drug Act?

A. On technical charges only.

Q. And the defendant was the Direct Sales Company wasn't it?

A. Yes.

Q. And it was for misbranding your product?

A. Well, if tablets don't fall within the tolerances allowed by the Government, they call that misbranding.

Q. And it was on three counts?

Mr. Mahoney: I object to that. The facts are not competent and it is not proper examination.

The Court: I don't think you can go into the facts. In other words, we cannot try those cases over.

Mr. Doyle:

Q. How many times has your corporation been convicted of that?

A. Three on technical charges.

Q. The last one in 1937 was when you were joined then?

A. Yes.

[fol. 299] Q. Do you remember one, March 24th, 1937?

A. Yes.

Q. That was for not complying with the standard of purity?

A. Well, the medicines didn't fall within the tolerances allowed by the Government and their tolerance is from five to twenty per cent, depending on the items.

Q. I don't want to go into all of that, but they were the usual household remedies?

A. Yes, but I might say that I don't know a drug company that has not been tried on that, even those you mentioned yesterday.

Q. January 11th, 1937?

A. I believe that is one of them.

Q. And charged with an offence on June 30th?

A. Yes.

Q. The company was convicted?

A. Yes, I admitted it.

Q. Do you remember one on August 24th, 1936?

A. Yes, that is correct, and the third one in 1918. Three in thirty years is not so bad, according to the way I look at it.

Q. What about July 11th, 1932; do you remember that, a $500.00 fine?

A. I just don't recall. I know the item more than the date.

Mr. Mahoney: I object to his as incompetent, irrelevant and immaterial. You have already ruled.

The Court: He has already admitted that he has been convicted for violation of the Pure Food and Drug Law. We cannot go into all those.

Mr. Doyle: Then 1918 you say?

A. Yes.

[fol. 300] Q. Did you ever check up after this to see how much morphine sulphate Dr. Tate had bought from you?

A. Only after we received the indictment.

Q. Did you find it to be 117,600 half-grains?

A. No, I didn't figure the amounts. I just looked over the blanks and saw that our records were in good order. I saw that Mr. Bransky had okayed them while in the office and had checked the records from January to June, 1936. I had every reason to believe that Dr. Tate was all right.

Q. When?

A. Well, after Mr. Bransky's check-up.

Q. You spoke of cough syrup, morphine being used in that. Don't you know that codein is more often used in that than morphine?

A. No, I do not.

Q. Are you a chemist?

A. No, I am not. I have had practical experience, but never studied it at school.

Q. Does the cough medicine you put out contain morphine or codein?

A. We don't put any in our cough syrup.

Q. Not even codein?

A. No, we do not unless the doctor wants it on special order; then we will make it up.

Q. Have you checked your records to see that you use a great deal more morphine than codein?

Mr. Mahoney: I object. It is incompetent, irrelevant, and immaterial.

The Court: What is the competency of that?

[fol. 301] Mr. Doyle: Dr. Blake testified yesterday as to the relative use of it over the country.

Mr. Mahoney: No, he testified as to his experience.

The Court: I don't think that is competent.

Redirect examination.

By Mr. Mahoney:

Q. Mr. Dotterweich, you testified here somewhat about the tolerance allowance by the United States Government?

A. Yes.

Q. As to violations of the Pure Food and Drug Act?

A. I did.

Q. There is a percentage as to strength that is allowed by the Department that supervises the Pure Food and Drug Act of the United States?

A. That is right.

Q. What is the percentage of that tolerance; what is the swing in percentage?

A. It varies from five to twenty per cent either way, over or under.

Q. Either way, over or under?

A. Either way.

Q. And these violations you have testified to here——

Mr. Doyle: Now, your Honor, if he goes into that, I want to cross-examine on that.

Mr. Mahoney: Well, I won't even do it.

Q. Now, it was testified here in answer to a question that catalogues were sent out every ten days, but you don't always send a catalogue every ten days?

A. We don't send a catalogue every ten days, but we send [fol. 302] some sort of reminder, maybe a postal card, or some other sales sheet, or something of that sort.

Witness leaves stand.

Mr. Mahoney: The defendant, Direct Sales Company, rests, your Honor.

A recess is taken and the jury retires to the jury room.

Ruling on Motion for Directed Verdict

The Court: Before the jury comes back, I will hear your further argument, of course, but I have studied this question pretty thoroughly myself. It is a novel case. I haven't been able to find any exactly like it in the books, and counsel for the Government, as well as yourself, have been unable to find any case exactly like it. Of course, the cases

you cite you argue are by analogy authority that your motion for a directed verdict of not guilty should be granted, but in this case you have the president of the company stating that once every ten days he either sends out a catalogue or a reminder of his prices. I consider that a catalogue is more or less an offer to sell, and when Dr. Tate ordered from that catalogue it was more or less an acceptance of that offer to sell him, an agreement which in itself is not unlawful; but it seems to me that you have probably enough facts in the case to submit to the jury the issue of whether or not, considering all the facts in connection with the agreement, there was a common purpose and design between Dr. Tate and the defendant, Direct Sales Company, to violate the Harrison Narcotic Law. The testimony of the large amounts that were sent to him and the [fol. 303] frequency, together with the contract made between them of the purchase and sale, and other circumstances in evidence, in my opinion probably makes it an issue for the jury. I must confess, however, that it is a mighty close question, and if it were not a novel question I might be inclined to grant your motion, but it being a novel question and a new question, I think a District Judge should let the Circuit Court of Appeals pass on it. Of course, if I should direct a verdict, that would not end it and the question would not be settled. I think it is a question that ought to be settled by the Circuit Court of Appeals. I think the District Attorney should have indicted this defendant for a substantive offence instead of conspiracy. The Courts are frowning down on cases of conspiracy which use a dragnet to bring in the evidence. I must say that I have considerable doubt that I should not direct a verdict in this case, but as I say, it being a novel question, I think that the Circuit Court of Appeals should pass upon it, since it is such an important question. I have given it considerable thought and study. I went home last night and thought about it from different angles, and it seems to me that there is probably enough testimony to submit to the jury on the question of whether or not it constitutes a conspiracy. Of course, I will hear you, Mr. Mahoney, if you care to argue.

Mr. Mahoney: If your Honor, please, if there is no use of further argument, I will not argue on the motion at this time, but will defer it.

The Court: Mr. Mahoney excepts to the ruling of the Court and an exception is allowed.

Mr. Mahoney: Your Honor, you recollect that you al-
[fol. 304] lowed certain testimony in here subject to being connected up.

The Court: Well, I am going to admit all that testimony that I reserved my decision on. An exception is taken and allowed. I think the District Attorney rather went at this case backwards and should have put up Dr. Tate first. That is the reason I reserved my decision.

MOTIONS TO STRIKE

Mr. Mahoney: I move to strike the testimony of Dr. Ham, J. S. Lanigan, A. P. Rogers, Ruby Lamar, George C. Johnson, and, Dr. Blake, on the grounds that it is incompetent, irrelevant and immaterial, and particularly not competent as to the defendant, Direct Sales Company. I take it, your Honor, that that is denied.

The Court: Yes, sir. Exception taken and allowed.

Mr. Mahoney: Then in regard to the exhibits. I objected at the time to Government's Exhibit #1, which is the COD notices, particularly prior to June 16th, 1939, and they were admitted subject to being stricken out. I may have an exception on that?

The Court: Yes, sir.

Mr. Mahoney: Also, on moving to strike the testimony of Mr. Weatherwax prior to June 16th, 1939 and subsequent to sometime in 1940. Then Government's Exhibits 11, 12 and 13, Exhibit 11 being the photostatic copies taken from our office, from 1934 to sometime in 1940; Exhibit 12 is a tabulation of that exhibit; and Exhibit 13 is a tabulation of the postoffice records. I take it that you will allow an exception on that. Also, I have renewed the motion made at the close of the Government's case for the direction of a verdict of not guilty, and ask for an exception to the defendant for record purposes.

The Court: That is right. Exceptions taken and allowed.
[fol. 305] After instructing the jury, the Court announces a recess until one o'clock p. m., at which time the trial is resumed.

After completion of arguments to the jury by Mr. Nickles, Mr. Mahoney, and Mr. Doyle, the Court charges the jury as follows:

[fol. 306] CHARGE OF THE COURT TO THE JURY

Mr. Foreman and Gentlemen of the Jury, you will give the Government and the defendants on trial a fair and impartial trial. In this controversy you are the sole judges of the facts and the credibility of the witnesses. In the trial of this case you have no friends to reward and no enemies to punish, because you have taken an oath to try this case according to the law as I shall give it to you, and according to the facts as you shall find them to be. You will, therefore, approach the consideration of this case in a judicial frame of mind. You are the sole judges of the facts. You judge the facts and find the facts and apply to them the law as I now give it to you. This indictment does not charge these defend-
[fol. 307] ants, Dr. Tate or the Direct Sales Company, a corporation, with having violated the Harrison Narcotic Law, but it charges these defendants with a conspiracy to violate certain parts of that Act. It charges that these defendants, along with George C. Johnson, Clyde Foster, and Reel B. Black—and you have under consideration in this case only the indictment as to Dr. John Victor Tate and the Direct Sales Company, because George C. Johnson and Reel B. Black have plead guilty, and the case of Clyde Foster has been with drawn from your consideration—this indictment charges that all of the defendants named in the indictment "did unlawfully, wilfully, and knowingly combine, conspire, confederate, and agree together that they would defraud the United States out of its revenues as provided by the terms of said Act, as amended, and that they would commit offenses against the United States of America by violating the provisions of Sections 1 and 2 thereof; that is to say, they would obtain large quantities of morphine sulphate by use of official order forms prescribed by the said Act, for purposes other than in the conduct of a lawful business in said drugs, or in the legitimate practice of medicine, and that they would sell, barter, exchange and give away said drugs, so obtained, without having registered in a classification under said Act permitting them so to do, and without having paid the special tax required, and that they would sell, barter, exchange and give away said drugs not in or from the original tax stamped packages, and not in pursuance of written order forms from the persons to whom sold, bartered, exchanged and given, and said unlawful purposes were to be accomplished in the following manner, to

wit: The Direct Sales Company, throughout the period herein mentioned, by means of circulars, catalogs and other advertising matter would and did induce the defendant, Dr. John Victor Tate to obtain from it by use of his official order forms, at frequent intervals, large quantities of morphine sulphate, then and there well knowing that said drugs were obtained for a purpose other than the use, sale and distribution by him, the said Dr. John Victor Tate, in the conduct of a lawful business in said drugs, or in the legitimate practice of his profession; that upon receipt of said [fol. 308] drugs by the defendant, Dr. John Victor Tate, from the defendant, Direct Sales Company, he, the said Dr. John Victor Tate, would and did sell, barter, exchange and give away the same in large quantities to the defendants, George C. Johnson, Clyde A. Foster and Reel B. Black, and other persons to the grand jurors aforesaid unknown, for the sole purpose of enabling said persons to satisfy their addi-tion to said drugs, and to sell and distribute the same to other persons in an unlawful manner, and said sales by the said Dr. John Victor Tate to the defendants, George C. Johnson, Clyde A. Foster, Reel B. Black, and other persons unknown, were not made pursuant to an order from said persons on a form prescribed for that purpose, and were not in or from the original stamped package; that after having so obtained the said narcotic drugs, they, the said George C. Johnson, Clyde A. Foster, and Reel B. Black, thereupon sold quantities of said to Doris Cox, Charles A. McMahan, Edith Davis, George Roller, and other persons to the grand jurors aforesaid unknown, and said sales were not made pursuant to any order forms from said persons to whom sold and were not made in or from the original stamped package, and same not being sold, bartered, exchanged, given away, dispensed and distributed under or by virtue of any of the exemptions and exceptions provided for in said Act of Congress." The indictment alleges that in pursuance of that unlawful agreement alleged in the indictment, they did certain alleged overt acts, which I will not take the time to read, but which you can read for yourselves when the indictment is presented for your consideration. As I said at the outset, this indictment does not charge these defendants with having violated the Harrison Narcotic Act, so you can dismiss that part of it from your mind; but it charges them with having entered into a conspiracy to violate the Harrison Narcotic Act, as amended, under Section 88, Title 18, I believe, of the

United States Code, which is, as follows: "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than [fol. 309] $10,000, or imprisoned not more than two years, or both." I charge you that as to the punishment, you have no concern. That is a question for the Court and only for the Court, and for no one else. You will observe that the elements of a conspiracy under this section are, first, the act of two or more persons conspiring together. One man cannot conspire with himself; there must be two. You cannot convict one; you must convict two. Second, to commit any offense against the United States, or to defraud the United States in any manner or for any purpose. Third, to do any act to effect the object of the conspiracy. So you see those three things must be present to convict under a charge of conspiracy as alleged in this indictment. I charge you in that connection that under the offense charged in this case, you cannot find the Direct Sales Company guilty and Dr. Tate not guilty. You can find Dr. Tate guilty and the others named in the indictment guilty, but you cannot find the Direct Sales Company guilty unless you also find Dr. Tate guilty. You should, therefore, know something about the law of conspiracy. You might think I am going at a little too great length in discussing it, but I think I should do so because there has been a great deal said about it in the decisions of the different Courts of the United States.

The gist of the offense is conspiracy, combination, or agreement to effect an unlawful end, which offense is completed only on some one or more of the parties doing an act to effect the object of the conspiracy, termed an overt act. It is not necessary that such co-conspirator have knowledge of all details of conspiracy or means to be used. It is not necessary that the conspirators should meet together in order to constitute the unlawful combination. If they have a mutual understanding, and act through one or more individuals, as a consequence of such mutual understanding, the conspiracy may be complete. It is not necessary to prove by direct evidence the agreement to violate the law, or to defraud the United States. In conspiracy cases, direct evidence of the conspiracy is rarely obtained. The unlawful agreement, which is the gist of the crime, is almost always

entered into secretly, and it thus results that nearly all conspiracies must be proven by circumstantial evidence. To [fol. 310] sustain a charge of conspiracy, it is not necessary that the Government furnish direct proof of the unlawful plan or agreement, but such charge may be sustained by evidence showing concert of action in the commission of the unlawful act or by proof of other facts from which the natural inference arises that the unlawful overt act was in furtherance of the common design of the alleged conspirators. A conspiracy is an offense which can ordinarily be established only by a great number of apparently disconnected circumstances. It is not necessary that the Government prove to you beyond a reasonable doubt that all of the overt acts alleged in the indictment were committed in furtherance of the conspiracy. If the Government proves to you beyond a reasonable doubt that any one or more of them were committed in furtherance of the conspiracy, that would be sufficient. That means that the Government is not compelled to prove beyond a reasonable doubt all of the charges in the indictment as far as the overt acts are concerned. It is necessary that the Government prove the crime of conspiracy, that is, the unlawful agreement, beyond a reasonable doubt, as it alleges in the indictment, but it is not necessary that the Government prove beyond a reasonable doubt all of the overt acts, as alleged in the indictment, in furtherance of the unlawful agreement. I think one of the clearest definitions of conspiracy is one by our own Circuit Court of Appeals, which to my mind presents it in very clear language.

"The basis of a conspiracy is the unity of design and purpose; it is what has been agreed to and not what has been done, and so it has been held that several persons may, simultaneously, actually do, without incurring liability to punishment, that which, if it were the object of a preconcerted design, would render the participants liable to indictment for conspiracy; nor will evidence that each of several defendants acted illegally or maliciously with the same end in view support a charge of conspiracy, unless it appears that such acts were done pursuant to a mutual agreement. It is true, as held in many cases, that the proof of the terms of the conspiracy may be supported by proof of what was done. The nature of the crime itself is such as [fol. 311] to render it almost impossible to establish the

agreement by direct proof of the discussion between the parties in reaching their agreement."

Now, in this case the pertinent parts of the statute that the defendants are alleged to have agreed to violate are these: "That it shall be unlawful for any person to sell, barter, exchange, or give away any of the aforesaid drugs"—that is, morphine sulphate, "except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Commissioner of Internal Revenue." "It shall be unlawful for any person to obtain by means of said order forms any of the aforesaid drugs for any purpose other than the use, sale, or distribution thereof by him in the conduct of a lawful business in said drugs or in the legitimate practice of his profession." Now, the statute makes an exception as to doctors, dispensing directly to patients: "To the dispensing, or administration, or giving away of any of the aforesaid drugs to a patient by a registered physician, dentist, veterinary surgeon, or other practitioner in the course of his professional practice, and where said drugs are dispensed or administered to the patient for legitimate medical purposes," and so forth. You are to inquire first in this case whether the prescriptions or doses alleged to have been given to these people named in the indictment, Johnson, Black and the others I don't recall, were issued by the physician, Dr. Tate, in the course of his professional practice only, or to patients whom the physician was personally attending; or were the prescriptions issued to said persons to satisfy the appetites and cravings of said persons for said narcotic drug in an amount sufficient to keep said persons comfortable by maintaining their customary use, for if the prescriptions were given to said persons or if the morphine sulphate was given to said persons to satisfy their craving for the drug, or for the purpose of selling the drug, or to maintain their usual supply of said drug, the prescriptions, while being on their face regular and lawful, would not be prescriptions at all, and the prescribing of them or the giving of them would not be in the course of professional practice only. As said by the Supreme Court, [fol. 312] "Manifestly, the phrases, 'to a patient' and 'in the course of his professional practice only' are intended to confine the immunity of a registered physician, in dispensing the narcotic drugs mentioned in the Act, strictly

within the appropriate bounds of a physician's professional practice, and not to extend it to include a sale to a dealer or a distribution intended to cater to the appetite or satisfy the craving of one addicted to the use of the drug." A prescription, issued and delivered to a person with intent that it shall be filled and the drug sold and delivered to him for the purpose of keeping him supplied with morphine sufficient to keep him comfortable and to maintain his usual supply, is not a prescription as contemplated by the Act. Now, as to this case. If a physician makes an order on an order form supplied by the Department, and in bad faith, and the wholesale druggist acts in collusion with him to violate the law, they may well be guilty of conspiracy, but before you could convict the wholesale druggist of conspiracy, you would have to find that he acted in collusion with the doctor as a result of a corrupt agreement or corrupt combination. Mere carelessness on the part of the wholesale druggist or lack of investigation on its part would not be sufficient. It must have sold the drugs knowing it was selling to the doctor at the time and that the purpose of the ordering of the morphine was to satisfy the craving of addicts or for him to sell unlawfully to other people and not in the course of his legitimate practice. I charge you that you could not convict because the evidence might raise the suspicion that one of the defendants was guilty of carelessness or negligence or that he or it even violated the Narcotic Law. You must find beyond a reasonable doubt that the defendants had guilty knowledge of the conspiracy and were acting in concert together before you could convict. The joinder of the minds of the defendants, that is, that they conspired together and entered into a corrupt agreement, is something which the Government must prove beyond a reasonable doubt, for it is of the essence of the crime charged; without it there can be no criminal conspiracy and the defendants could not be convicted under this indictment. The United States Supreme Court has [fol. 313] declared that a conspiracy imports a corrupt agreement between not less than two persons, with guilty knowledge on the part of each. I charge you that in this case there could be no verdict against the defendants unless you found beyond a reasonable doubt that the defendants had a corrupt agreement between them and had guilty knowledge as alleged in the indictment. I charge you that

the Harrison Narcotic Act does not limit the amount of morphine sulphate which a physician may prescribe or administer to his patient in the course of his professional practice, and if the defendant, Dr. Tate, in the course of his professional practice prescribed for the various persons, the quantity given is not to be considered by you, unless the testimony shows that there was such an enormous amount that it could be used only for satisfying the craving of addicts or for its sale to persons unlawfully. In the *Linder case*, the United States Supreme Court says: "It (referring to the Harrison Narcotic Act) says nothing of 'addicts' and does not undertake to prescribe methods for their medical treatment. They are diseased and proper subjects for such treatment, and we cannot possibly conclude that a physician acted improperly or unwisely or for other than medical purposes solely because he has dispensed to one of them, in the ordinary course and in good faith, four small tablets of morphine or cocaine for relief of conditions incident to addiction. What constitutes *bona fide* medical practice must be determined upon consideration of evidence and attending circumstances. Mere pretense of such practice, of course, cannot legalize forbidden sales, or otherwise nullify valid provisions of the statute, or defeat such regulations as may be fairly appropriate to its enforcement within the proper limitations of a revenue measure." Those observations, Gentlemen of the Jury, are some I just call your attention to. There are quite a number of other expressions by the Supreme Court, by the Circuit Courts of Appeal, and by the District Courts bearing upon the question, but I think that is enough to charge you upon that particular point as to what is *bona fide* and what is necessary proof as far as this case is concerned. Now, I charge you that before you can convict these defendants—and you have to convict both; you cannot convict one; you must convict two [fol. 314] or none—before you can convict these defendants as charged in this indictment, the Government must prove their guilt, in accordance with the law and the evidence, beyond a reasonable doubt. Now, a reasonable doubt doesn't mean beyond the shadow of a doubt. It means what it says. It means a substantial doubt; a doubt for which you can give a reason. These defendants, as are all defendants, when they come into court, are clothed with the presumption of innocence, and that presumption of inno-

cence follows them throughout the trial of the case and until the Government proves beyond a reasonable doubt that they are guilty as charged in the indictment. Now, the District Attorney has asked me to charge you this, which I think I have practically charged: "Certainly it is not essential, in dealing with conspiracy, that the persons acted together in a formal manner, with the solemnity or with the deliberation that is found in the ordinary lawful transactions of life. That is not at all essential in determining whether an agreement is a confederation or a conspiracy of the character condemned by the statute. It suffices in any event that there be shown by any manner of means the making of an unlawful combination, namely, that the thing sought to be accomplished may be evidenced by acts, conduct, association, contracts not in the open—secretly clandestinely—frequently by mere matters of conduct, by acts circumstantial in their character; and this situation arises, I believe, in a majority of cases for the establishment of the crime of conspiracy. It is not at all necessary that defendants should have knowledge as to who all the members of the conspiracy were. The range of the character of conspiracy, the range of the means of evidencing it, is nearly as broad as the possibilities of men to agree upon means and methods of acting together. Guilt can be based, and must necessarily be based, in many conspiracy cases, upon purely circumstantial evidence; in many cases upon direct and positive testimony, together with circumstantial evidence. Crimes are not ordinarily committed in the open." I charge you that. The defendant asks me to charge you that "an indictment is no evidence of the guilt of the defendant." I charge you that. The indictment is given you so you may [fol. 315] know what the defendants are charged with. The indictment sets out and describes the alleged offense so that you can consider the evidence and the law and find if the defendants are guilty or not guilty, as alleged in the indictment. The indictment is the chart for you to go by. You apply the law to the facts and see if the defendants are guilty as charged in the indictment. I have already charged you as to the presumption of innocence. "The burden rests exclusively upon the Government to prove the guilt of the defendant beyond a reasonable doubt." I have already charged you that and I charge it again. "No burden rests upon the defendant to prove its innocence." No burden rests upon the defendants to prove their innocence, and as

I say, you cannot convict one without both. "The mere fact that some or all of the defendants indicted have plead guilty is no evidence of the guilt of the defendant and is not to be so construed by the jury." I charge you that. "Suspicion in the mind of the jury is not sufficient to justify a conviction." I have already charged you that and I charge it again. "The gist of the crime is the agreement of combination or understanding in this case to do an unlawful act." I have already charged that and I charge it again. "If an illegal combination or agreement was formed by the doctor and others, the mere fact that the defendant supplied morphine sulphate pursuant to proper order blank is not sufficient. The defendant must have had knowledge of such conspiracy," or there must have been a common design and purpose and guilty cooperation. I added that to it. "Before convicting, the jury must find that the defendant knew of the existence of a conspiracy and with knowledge thereof joined in the same." I charge you that. "If two inferences may be drawn from a given state of facts, one inference which is consistent with innocence and the other consistent with guilt, the jury must give the defendant the benefit of the doubt and adopt the inference of innocence, rather than that of guilt." I charge you that. "As to circumstantial evidence, the circumstances relied upon must so distinctly indicate guilt as to leave no reasonable explanation of them which is consistent with innocence, otherwise a jury must find a verdict of not guilty." I charge you that. "If any [fols. 316-317] witness has testified wilfully and falsely to any wilful act, the jury is at liberty to diregard his entire testimony." I charge you that. "The statute provides that the defendant must retain narcotic orders for physicians for a period of two years." I charge you that. "The Act provides for the Commissioner of Narcotics to supply forms for narcotic orders from doctors to defendant wholesaler, whereas the regulations provide (Article 91) that the Government does not furnish prescription form." I charge you that. "The Act provides for the filing by defendant of monthly returns." I charge you that. "The Act provides that the furnishing of the catalogue number is optional." I charge you that. "The Act provides that the disposition of the returns must be reported." What do you mean by that?

Mr. Mahoney: I ask you to charge that the Act provides that in the event a prescription order is received from a [fol. 318] *a* physician and not filled, it must be reported to the Narcotic Bureau.

The Court: I charge you that in those words. Gentlemen, that is about all the law I know of in this case.

Mr. Doyle: The Government is satisfied.

Mr. Mahoney: I have several requests, your Honor. I will ask your Honor, in view of the summation of the District Attorney, to charge that the jury is not concerned with what type of revenue law should be enacted.

The Court: I charge you that.

Mr. Mahoney: I ask your Honor to charge that jurors are not concerned with the tremendous expense of the United States in curing addicts.

The Court: I charge you that.

Mr. Mahoney: I ask your Honor to charge that the jury should disregard the expenses of the United States in determining the question in this case.

The Court: I charge you that.

Mr. Mahoney: I will ask your Honor to charge that the jury should not consider that they are concerned with the elimination of the illicit drug traffic of the United States.

The Court: That is not your problem, Gentlemen of the jury. Your problem is to try the issues in this case and nothing else.

Mr. Mahoney: I will ask your Honor to charge the jury that there is no evidence in this case that $1400 worth of morphine is enough for all the hospitals in South Carolina.

The Court: I charge you that. There is no evidence to that effect.

[fol. 319] Mr. Mahoney: I will ask your Honor to charge the jury that they should disregard the District Attorney's argument substantially, that the doctors from Maine to Florida and from East to West spent the sum of $205.00 for morphine over this period of years.

Mr. Doyle: I don't know that I said that.

The Court: If he did say that, disregard it.

Mr. Mahoney: I will ask your Honor to charge the jury that the innocence or guilt or conviction in this case of Foster, Tate, Black or Johnson on substantive charges has no bearing on the guilt of the Direct Sales Company for conspiracy.

The Court: It has nothing to do with that. You will consider only the trial issues involved in this case.

Mr. Mahoney: I will ask your Honor to charge the jury that the question of a big man or little man, as argued by the District Attorney, is not to be considered by the jury in determining the question involved.

The Court: I charge you that. In this Court all of the defendants are the same size and there are no big or little men.

Mr. Mahoney: I will ask your Honor to charge the jury that there is no evidence that the defendant adulterated its products as argued by the District Attorney.

The Court: I charge you, Gentlemen of the Jury, that the word "adulterated" was not used. What was said was that the corporation, this defendant, has been convicted under the Pure Food and Drug Act.

Mr. Mahoney: I will ask your Honor to charge the jury that evidence of frequent sales is insufficient evidence, in [fol. 320] and of itself, upon which to base a verdict of guilty against the defendant, Direct Sales Company.

The Court: Gentlemen, I charge you in that connection that evidence of frequent sales, of itself, would not be enough, but you have the right to take that into consideration together with all other circumstances in the case, to ascertain whether or not there was an unlawful conspiracy as alleged.

Mr. Mahoney: We take an exception.

The Court: Exception allowed.

Mr. Mahoney: I will ask your Honor to charge the jury that evidence of sales in amounts of 1000, in and of itself, is insufficient to warrant a verdict of guilty.

The Court: I charge you that, Gentlemen, with the addition that you have the right to take that into consideration, together with all other facts and circumstances of the case, as to whether or not the conspiracy alleged in the indictment has been proved beyond a reasonable doubt.

Mr. Mahoney: I will ask your Honor to charge the jury that the method of advertising is not evidence of a conspiracy.

The Court: I charge you, Gentlemen of the Jury, that the manner of advertising is a circumstance which you can take into consideration in connection with all other facts and circumstances as to whether or not the conspiracy alleged has been proved beyond a reasonable doubt.

Mr. Mahoney: I respectfully except to your Honor's phraseology of that charge, as well as your Honor's refusal to charge in the manner requested.

The Court: Exception allowed.

Mr. Mahoney: I will ask your Honor to charge the jury [fol. 321] that the receipt of a catalogue by a doctor from the defendant involves no obligation on the part of the doctor to buy.

The Court: Read that again. I want to say that the rules require you to submit requests before you argue.

Mr. Mahoney: I asked your Honor to charge the Jury that the receipt of a catalogue by a physician from the defendant, Direct Sales Company, involves no obligation on the part of the physician to purchase from the Direct Sales Company.

The Court: I charge you that.

Mr. Doyle: In that connection, I ask you to charge also that it is an invitation to buy.

The Court: Yes, I have already charged that it is an offer to sell.

Mr. Mahoney: An exception, respectfuily, to that.

The Court: Exception allowed.

Mr. Mahoney: Will your Honor charge the jury that evidence of temptation is not evidence of a conspiracy?

The Court: I charge you that.

Mr. Mahoney: I ask your Honor to charge the jury that the manner of advertising is discretionary with the defendant and is not evidence of a conspiracy.

The Court: I charge you that it is discretionary with the defendant, but it is a fact and circumstance that you can take into consideration with all other facts and circumstances of the case. This is most unusual. Let the record show that these requests were made after argument and after completion of the Court's charge and I haven't had any time to consider them. It is against the rules of court, but I will charge them as best I can.

[fol. 322] Mr. Mahoney: In view of the charge that the jury cannot convict one but must convict two, I ask your Honor to charge that this jury could convict Dr. Tate and the other defendants and find the defendant, Direct Sales Company, not guilty.

The Court: I did practically charge that before, but I will charge it again. Gentlemen of the Jury, the form of your verdict will be: We, the jury, find the defendants,

naming them, guilty; or, We, the jury, find the defendants, naming them, not guilty. As I charged you, you cannot find the Direct Sales Company guilty unless you find Dr. Tate guilty. You can find Dr. Tate and the other defendants guilty. There are no other defendants on trial.

Mr. Mahoney: Foster is removed.

The Court: You can find Dr. Tate guilty of having conspired, as alleged in the indictment, and you can find the defendant, Direct Sales Company, not guilty.

The exhibits are handed the Foreman of the jury, and the jury retires.

Later the Court requests the Marshal to bring in the Foreman.

The Court: Mr. Foreman, are there any prospects of your agreeing upon a verdict at any time soon?

Foreman: It doesn't seem that it will be in a few minutes.

The Court: Do you think you will need any instructions on the law?

Foreman: I don't think so.

The Court: The reason I ask, I am going to leave and [fol. 323] *and* let the Clerk receive your verdict. If you want any further instructions on the law, I will give it.

Foreman: Shall I ask them?

The Court: Are there any objections for him to ask them?

Mr. Mahoney: None whatsoever.

The Court: See if you need any further instructions on the law.

The Foreman retires, and later returns.

Foreman: Your Honor, they don't desire any further charge.

The Court: The clerk will receive your verdict whenever you agree. Just knock on the door and let the Bailiff know and the Clerk will receive your verdict.

The Foreman retires.

The Court: Let the minutes of the Court show that this Greenwood term is extended until January 1st, and any of the defendants will have the right to note any motions on the records that they may deem advisable. In case of conviction, we can agree on the date of sentence at a later date. Any prayer for judgment will be continued to a later

date. The Clerk will receive the verdict and discharge the jury.

VERDICT

After further deliberation, the jury returns a verdict finding the defendants, Direct Sales Company, and Dr. John Victor Tate, guilty.

MOTION TO SET ASIDE VERDICT, ETC.

Mr. Mahoney: A motion is made on behalf of the defendant, Direct Sales Company, to set aside the verdict on the grounds that it was contrary to the law and against the weight of the evidence, and the motion in arrest of judg-
[fol. 324] ment and the decision is reserved on that by the Court.

The jury is discharged by the Clerk and Court is adjourned.

Reporter's Certificate to foregoing transcript omitted in printing.

[fol. 325] REQUESTS TO CHARGE

1. Indictment is no evidence of the guilt of the defendant.

2. Presumption of innocence.

3. Burden rests exclusively upon the Government to prove the guilt of the defendant beyond a reasonable doubt.

4. No burden rests upon the defendant to prove its innocence.

5. Mere fact that some or all of the defendants indicted have plead guilty is no evidence of the guilt of the defendant and is not to be so construed by the jury.

6. Suspicion in the mind of the jury is not sufficient to justify a conviction.

7. The gist of the crime is the agreement or combination or understanding in this case to do an unlawful act.

8. Before convicting, the jury must find that the defendant knew of the existence of a conspiracy and with knowledge thereof joined in the same.

9. If two inferences may be drawn from a given state of facts, one inference which is consistent with innocence and the other consistent with guilt, the jury must give the defendant the benefit of the doubt and adopt the inference of innocence, rather than that of the guilt.

10. As to circumstantial evidence, the circumstances relied upon must so distinctly indicate guilt as to leave no reasonable explanation of them which is consistent with innocence, otherwise a jury must find a verdict of not guilty.

11. If any witness has testified wilfully and falsely to any wilful act, the jury is at liberty to disregard his entire testimony.

A motion was made by the defendant appellant to set aside verdict and for a directed verdict of not guilty and [fol. 326] decision was reserved thereon.

MOTION TO SET ASIDE VERDICT, ETC.

Now comes the defendant above named, Direct Sales Company, Inc., by its attorney, and moves the Court to set aside the verdict of the jury rendered herein as to the defendant and for a new trial for the following reasons:

1. That the verdict of the jury is contrary to the evidence, the weight of evidence, and contrary to law.

2. That the allegations of the indictment are insufficient to charge a violation of Section 37 of the United States Criminal Code.

3. That the Court erred in overruling and denying the defendant's motion for a dismissal of the indictment.

4. That the Court erred in overruling and denying the defendant's motion for a direction of a verdict of not guilty at the conclusion of the Government's case and at the conclusion of the entire case.

5. That it was error to admit the testimony of Dr. Coyt Ham, J. S. Lanigan, Albert P. Rogers, Ruby LaMar, George J. Johnson, Dorris Cox, Joseph M. Bransky, Dr. Blake,

as well as Government's Exhibit 14 against defendant, Direct Sales Co., Inc.

William B. Mahoney, Atty. for Appellant, Direct Sales Co., Inc., Office & P. O. Address, 405 Walbridge Bldg., Buffalo, N. Y.

To Oscar H. Doyle, U. S. District Attorney, Western District of South Carolina.

United States District Court, West. Dist. of So. Car. Dec. 15, 1941. Filed — A. M., — P. M. W. D. White, Clerk.

[fol. 327] MOTION FOR ARREST OF JUDGMENT

Now comes the defendant, Direct Sales Company, Inc., by its attorney, and moves the Court for an arrest of judgment from the indictment upon which the defendant was convicted for the following reasons:

1. Because the evidence adduced at the trial was not sufficient to sustain the allegations of the indictment, or to establish any of the alleged violations of law set forth in the indictment, and more specifically a violation of Section 37 of the United States Criminal Code.

2. The Court erred in overruling defendant's demurrer as well as its plea in abatement.

3. Because the Court erred in failing to grant the defendant's motion for dismissal of the indictment and a directed verdict of not guilty.

4. That the verdict of the jury as to defendant, Direct Sales Co., Inc., is against the weight of evidence and contrary to law.

William B. Mahoney, Attorney for Appellant Direct Sales Co., Inc., Office & P. O. Address, 405 Walbridge Bldg., Buffalo, N. Y.

To Oscar H. Doyle, U. S. District Attorney, Western District of South Carolina.

[fol. 328] IN THE UNITED STATES DISTRICT COURT

UNITED STATES OF AMERICA

v.

DIRECT SALES COMPANY, INC., DR. JOHN VICTOR TATE, GEORGE C. JOHNSON, CLYDE A. FOSTER, REEL B. BLACK, Defendants

OPINION ON MOTION FOR NEW TRIAL AND MOTION FOR ARREST OF JUDGMENT—Filed April 24, 1942

The indictment in this case charges the defendants with a conspiracy to violate the Harrison Narcotic Act. The defendants Black and Johnson entered pleas of guilty. During the trial the defendant Foster suffered a heart attack and by consent, a mistrial was ordered in the case against him, and the trial proceeded against defendants Tate and Direct Sales Company.

At the conclusion of the testimony, a motion was made for a directed verdict of not guilty on the ground that the evidence was insufficient to support the charge in the indictment. The motion was overruled and the jury returned a verdict of guilty. The case is now before me on motion for new trial on the ground that the verdict is contrary to the law and the evidence; that the Court erred in not directing a verdict of not guilty; and upon other grounds which have already been disposed of on the motion to quash the indictment.

The testimony discloses that Direct Sales Company is a corporation, having its principal place of business at Buffalo, New York, and is a manufacturer of and a wholesale dealer in drugs, including narcotics, and at the times mentioned in the indictment was registered as such under the provisions of the Harrison Narcotic Act. Dr. John Victor Tate is a physician residing at Calhoun Falls, South Carolina, and was at the times mentioned in the indictment, registered under provisions of the Act in his proper class. The defendant Johnson was a resident of Augusta, Georgia, and defendants Foster and Black were residents of Spartanburg, South Carolina. Neither of them had been reg-[fol. 329] istered or had paid the special tax in any class under the provisions of the Act.

The Direct Sales Company, as its name implies, sells directly to the customer. It has no traveling representatives,

It solicited the business of Dr. Tate by means of Catalogs and circulars sent to him every ten days. The catalog used by this defendant is an ordinary pamphlet printed in black type on white paper, and a great number of preparations are listed in it. Narcotics, however, are not listed in the catalog itself. This defendant's uniform practice, during the period alleged in the indictment, was to insert into the catalogs a sheet of paper approximately four inches wide by five and one-half inches long, sometimes colored pink and sometime blue, on which was listed morphine sulphate. It offered tablets of morphine sulphate for sale in lots of five hundred, one thousand and five thousand, one-quarter and one-half grain tablets. The prices were from thirty to forty per cent. less than could be obtained elsewhere.

There was expert testimony by competent witnesses that the standard dose of morphine was from one-eighth to one-quarter grain, and in rare instances, one-half grain; that it is administered to alleviate pain and as a sedative, and that codein is also used for such purposes. Dr. Blake who testified as a witness for the government, said he used one hundred codein tablets to one of morphine.

Narcotic Agent Bransky went to the offices of the Direct Sales Company in August, 1936, and told the officers of the company that he had been sent there by the Commissioner of Narcotics, because large quantities of narcotics which the company had been selling to registrants throughout the United States had been diverted into unlawful channels, and he asked their cooperation to curb such diversion. The officers replied that they had only sold to registrants on order forms, and had no way of knowing what disposition was being made of the drugs. Bransky told them that it was his experience as an officer that when a physician ordered one-half grains of morphine sulphate, it could be assumed that it was to be used for other than legitimate [fol. 330] purposes, and was being dispensed to satisfy addiction in violation of law. He told them that it was his experience over a long period of years as an investigator, that the average physician throughout the United States would purchase from two hundred to four hundred one-quarter grain tablets of morphine sulphate in one year. He showed to the officers of the company a list of two hundred and four names of class 4 registrants who had been convicted of violations of the Narcotic laws. By permission of the company, he investigated its records and in-

formed the President of the company at that time that of the two hu-dred and four physicians who had been convicted for violations of the Narcotic laws of the United States, fifty-five of them were customers of this defendant. This witness called the attention of the President of the Company to his catalog listings, and told him some of the best known companies listed morphine in lots not to exceed one hundred one-quarter grain and half grain tablets, and that the Direct Sales Company was listing in lots of five hundred, one thousand and five thousand. Later the company's listings were changed to show lots of five hundred and one thousand. He asked the company to limit the amount to be sold on one order form to one thousand half-grain tablets, to which this defendant agreed. He did this, as he said, in a spirit of cooperation, as he had no authority under the law to demand it. In the year 1936, he testified, that the President of the Company told him he had ordered five thousand ounces of morphine. The Direct Sales Company does an annual gross business of from $300,000.00 to $350,000.00, and the Government contends that its principal business is dealing in morphine. He said that the officers of the company promised to revise its catalogs so as not to show lots of five thousand tablets, and that they would not sell on one order form more than one thousand half-grain tablets, and so far as he knew they had kept their promise. It was shown that the purposes of the agreement to discontinue catalog listings of lots of five thousand tablets, and the agreement to limit to one thousand tablets the quantity to be sold on one order form was to reduce the amount going out to physicians and thus reduce the amount being di- [fol. 231] verted into unlawful channels. The Commissioner also asked the Company to discontinue the giving of discounts on narcotics in order further to reduce the flow to class 4 registrants. The Company complied with this request, but immediately listed prices with the discount already figured off. Dr. Tate was submitting order forms for one thousand half-grain tablets of morphine sulphate on an average of every five days, and in the latter period more often. All of his orders were for one thousand one-half grain tablets, with the exception of one submitted on June 28, 1939, in which he ordered one thousand one-half grain tablets and one hundred one-quarter grain tablets. On that occasion the Company filled his order for the one thousand one-half grain tablets, and wrote a letter to him requesting

him to submit another order form for the remaining part of the order. It was contended by the Government that this letter, while informing Dr. Tate of the rule that only one thousand tablets could be ordered on one order form, that it also suggested to him that all he needed to do was to split his purchase up into different order forms, and that the letter was so understood by him, as shown by his orders for the succeeding thirty days, during which he ordered six thousand one-half grain tablets, or one thousand more than in any other thirty-day period.

The President of the Company testified that he knew the only way Dr. Tate could dispose of the morphine Sulphate he ordered was by direct administration to his patients in the legitimate practice of his profession. This, of course, is the law. He could neither sell nor give it away. Dr. Tate was ordering one thousand one-half grain tablets at a time. One-half grain tablets, it was testified, are rarely used in the practice of medicine, but are frequently used by addicts. These orders came with regularity and it was shown that on many occasions one order was in the mail coming to Dr. Tate while his order form for another lot was on the way to Direct Sales Company. With negligible exceptions, Dr. Tate ordered no other preparations from the Direct Sales Company, and he ordered no codein. The Company was bound to know that the volume of morphine being used by Dr. Tate could by no stretch of the imagination be dispensed by him in the course of the legitimate practice of [fol. 332] medicine, and must, therefore, have known that he was diverting it into unlawful channels, particularly after it was told that 26.96 per cent. of all convicted physicians in the United States were its customers, who had likewise been ordering from it.

Section 2 of the Harrison Narcotic Act (26 U. S. C. A. 2554 (g)) provides, among other things, that: "It shall be unlawful for any person to obtain by means of said order forms any of the aforesaid drugs for any purpose other than *the use, sale, or distribution thereof by him in the conduct of a lawful business in said drugs or in the legitimate practice of his profession.*"

Direct Sales Company was bound to know that Dr. Tate was buying morphine on order forms for unlawful purposes. The catalogs and circulars sent to Dr. Tate every ten days constituted an offer to continue to furnish the morphine knowing it was to be used in the violation of the

narcotic law. Each time Dr. Tate accepted an offer contained in the catalog, an agreement was made, and the facts and circumstances were sufficient in my opinion to support the inference that what they did was done pursuant to a mutual understanding and a preconcerted design that the narcotic law was to be violated. *Asgill* v. *United States*, (C. C. A. 4) 60 F. (2d) 776; see also, *Heller* v. *United States*, (C. C. A. 4) 104 F. (2d) 446.

The fact that the sales were in large amounts and at frequent intervals are circumstances to be considered along with all other circumstances, and the Courts have given such facts consideration. In *Webb* v. *United States*, 249 U. S. 96, after reciting the facts, the Court said: "In order that these facts may have their true color, it should also be stated that within a period of eleven months Goldbaum purchased from wholesalers in Memphis, thirty times as much morphine as was bought by the average retail druggist doing a larger general business, and he sold narcotic drugs in 6,500 instances; * * * ". In *United States* v. *Behrman*, 258 U. S. 280, the Court said: "It may be admitted that to prescribe a single dose, or even a number of doses, may not bring a physician within the penalties of the act; but what is here charged is that the defendant physician by means of prescriptions has enabled one, known by him to be [fol. 333] an addict, to obtain from a pharmacist the enormous number of doses in 150 grains of heroin, 360 grains of morphine, and 210 grains of cocaine."

In *United States* v. *Curtis*, (D. C. N. Y.) 229 Fed. 288, the Court said: "A prescription, even if issued by a physician which on its face calls for an unusually and unreasonably large quantity of the drug, is fraudulent of course, as it bears internal evidence that it is not issued in good faith and that it is not a prescription." And, again in the same case: "It is evident to my mind that the sale, distribution, giving away, or dispensing of large and unusual quantities of these drugs, unaccompanied by explanation as to the necessity therefor, are sales and dispensing of the drug for the very purpose of evading the intentions and provisions of the act and therefore unlawful."

In the case of *Friedman* v. *United States*, (C. C. A. 6) 260 Fed. 388, it was insisted that the quantity purchased by the Thompsons was not relevant to any issue, but the Court said: "Further, these purchases were items of evidence which when considered in connection with other re-

lated matters, tended to show the character of the business carried on by the Thompsons. Naturally an inquiry would arise whether such a quantity was necessary to the conduct of any legitimate drug business." In this case we have the physician increasing his orders from about three thousand half-grain tablets every thirty days to as much as six thousand one-half grain tablets every thirty days, or four hundred standard doses per day and the company selling him this unusually large quantity continuing every ten days to solicit orders for as much as it can sell so long as not more than one thousand tablets are on a single order form. The orders came with such regularity and with such disregard as to the amount of the drugs, Dr. Tate was obtaining, that it was even shown that on November 13, 1939, the company mailed an order for one thousand half-grains which was delivered on November 17, 1939, and that on November 15, 1939, another order was mailed which was delivered on November 18, 1939.

An unlawful agreement need not be shown to exist in any formal way. In fact, it is a rare thing that an unlawful agreement can be so shown. A mutual understanding between the parties or any two or more of them is all that is [fol. 333a] necessary to prove a conspiracy. *United States* v. *Wilson* (D. C. W. Va.) 23 F. (2d) 112; *Fisher* v. *United States*, (C. C. A. 4), 13 F. (2d) 756.

The Direct Sales Company contends that because it does not know Dr. Tate or any of the other defendants it cannot conspire with them. Its dealings were with Dr. Tate over a period of years. It knew he could not lawfully dispense the amount of morphine he was purchasing. The facts were sufficient to justify the jury in concluding that with this knowledge it was combining with others to dispose of the drugs unlawfully. The guilt of a conspirator is not dependent on his knowledge of the entire scope of the conspiracy, and one conspirator need not know who all the other conspirators are. *McDonnell* v. *United States*, (C. C. A. 1) 19 F. (2d) 801, cert. den. 275 U. S. 551; *Jezewski* v. *United States*, (C. C. A. 6) 13 F. (2d) 599; *United States* v. *Sacia*, (D. C. N. J.) 2 Fed. 754; *Allen* v. *United States*, (C. C. A. 7), 4 F. (2d) 688.

But, it is contended that the case of *United States* v. *Falcone*, 311 U. S. 205, compels a different conclusion. In that case the Supreme Court said: "The question presented by this record is whether one who sells materials with knowl-

edge that they are intended for use or will be used in the production of illicit distilled spirits may be convicted as a co-conspirator with a distiller who conspired with others to distill the spirits in violation of the revenue laws", and after a discussion of the applicable authorities answered the question in the following language: "Those having no knowledge of the conspiracy are not conspirators, (citing cases); and one who without more furnishes supplies to an illicit distiller is not guilty of conspiracy even though his sale may have furthered the object of a conspiracy to which the distiller was a party but of which the supplier had no [fol. 334] knowledge. On this record we have no occasion to decide any other question."

The Falcones were jobbers of sugar who sold to wholesalers, who in turn sold to distillers. The decision might have been different had the Falcones sold direct to the distillers as was the case between Direct Sales Company and Dr. Tate. The Falcone case was much stronger against the defendants Alberico and Nole than against the Falcones. (See footnote to decision) The Court said, "The evidence respecting the volume of sales to any known to be distillers is too vague and inconclusive to support a jury finding that respondents knew of a conspiracy from the size of the purchases even though we were to assume what we do not decide that the knowledge would make them conspirators or aiders or abettors in the conspiracy". In the first place the evidence as to volume of sales in the Falcone case was "vague and inconclusive". In the instant case it is clear and conclusive, not a few isolated large sales but a systematic course of dealings covering a long period of time. In the second place, the sale of sugar and yeast is not the subject of strict legal regulation. Under certain circumstances a report of such sales must be made but no legal formalities must be complied with in making the sales. Such articles of merchandise may be freely sold in any amount to any person at any time and under any circumstances, whereas the sale and distribution of narcotics is strictly regulated by law. In the case of Dr. Tate, when he bought narcotics he could not sell them or give them away. There was only one way under the law by which he might dispose of them and that was by personal administration. The Direct Sales Company selling direct to him without the intervention of a middleman knew he could not possibly dispose of the drugs he was ordering in a lawful manner

and with such knowledge it did the *affirmative* things which the Falcones were not charged with doing, that is, it solicited further orders every ten days and did so in a peculiarly clever and attractive way. It suggested to him by letter dated June 30, 1939, that as often as he ordered, his orders would be filled just so long as he did not put more than one thousand half-grains on one order form. It from time to time changed the form of its advertisements [fol. 335] of narcotics so as to keep continuously before him attractive prices for *large lots*. It is as though its own salesman every ten days came around and personally solicited, using the arguments set forth in the advertisements, all the while knowing the impossibility of the drugs being used lawfully and that if they were being used unlawfully other persons were associated with him in such use. Knowing this, it *solicited, encouraged, instigated, induced, counseled* and *aided* Dr. Tate and thereby did the affirmative things which made it a party to an agreement with Dr. Tate and his associates although it may not have known who such associates were.

There have been three decisions of the appellate Courts since the Falcone decision in the Circuit Court which cite and distinguish the case. These will be briefly commented upon.

On March 25, 1940, the Circuit Court of Appeals for the Second Circuit, while its decision in the Falcone case was on appeal to the Supreme Court of the United States, had under consideration a conspiracy case, *United States* v. *Pandolfi*, 110 F. (2d) 736. In that case the Court said of the evidence, "It will be seen that if this evidence proves anything, it demonstrates much more *direct participation* in the conspiracy than was shown in United States v. Falcone, supra. If the jury were to be permitted to make the deductions and inferences from this proof which would be logical and natural under the circumstances, they would necessarily conclude that these defendants took an *active part* in carrying the conspiracy forward, and *did not limit their activities* merely to the legal sale of sugar. We feel there is no reason why the jury should be denied the opportunity to make such logical and natural inferences." (Italics added)

On June 10, 1940, while the Falcone case was on appeal, the Fourth Circuit Court of Appeals mentioned the case in *Backun* v. *United States*, 112 F. (2d) 635. In that case

Backun in New York bought silverware which he knew had been stolen and sold it to Zucker who was apprehended in Charlotte, North Carolina, in possession of some of it. The facts showed that Backun knew that Zucker traveled and sold goods out of the State of New York. They were in-
[fol. 336] dicted as principals under the National Stolen Property Act. This is not a conspiracy case but facts which show one defendant an aider and abettor will also frequently show him a conspirator had he been charged with conspiring with another. The first question raised by the appeal was that there was no evidence that Backun had anything to do with the transportation in interstate commerce. The Court said, "On the question raised by the first contention, it is to be noted that the case presented is not that of a mere seller of merchandise, who knows that the buyer intends to put it to an unlawful use, but who cannot be said in anywise to *will the unlawful use by the buyer.* Cf. United States v. Falcone, 2 Cir., 109 F. (2d) 579. It is the case of a sale of stolen property by a guilty possessor who knows that the buyer will transport it in interstate commerce in violation of law and *who desires to sell it to him for that reason.*" (Italics added) And in the same case, the Court said, "Guilt as an accessory depends, not on 'having a stake' in the outcome of crime, as suggested in the Falcone case, supra, but on aiding and assisting the perpetrators; and those who make a profit by furnishing to criminals, whether by sale or otherwise, the means to carry on their nefarious undertakings aid them just as truly as if they were actual partners with them, having a stake in the fruits of their enterprise. To say that the sale of goods is a normally lawful transaction is beside the point. *The seller may not ignore the purpose for which the purchase is made if he is advised of that purpose,* or wash his hands of the aid that he has given the perpetrator of a felony by the plea that he has merely made a sale of merchandise." (Italics added)

[fol. 337] On June 24, 1941, the Third Circuit had occasion to consider the Falcone case in *United States* v. *Harrison*, 121 F. (2d) 930. The appellant "was a dealer in sugar in New York City and was convicted of conspiracy to defraud the revenue through the operation of an unregistered still". The Court said, "The principal ground of his appeal is a claim for the benefit of a recent decision of the United States Supreme Court. He contends that it compels a di-

rection in his favor." After quoting the last paragraph of the opinion in the Falcone case, the Court says, "This is at most a declaration that the Supreme Court sides with the numerical minority on a question much agitated in the United States Courts during the prohibition era. That question is the legal position vis a vis a conspiracy of a seller who knows that the goods he supplies are destined for an illegal use; or in other words, of a 'wise' owner of innocent goods which contribute to the operation of illegal distillery. We can start with the *assumption that an intention to become a party to an illegal enterprise must be predicated on some affirmative action.* That is the concensus of both the minority and majority views. *The sale of goods surely constitutes affirmative action.* The problem has arisen in the civil as distinguished from the criminal law. There we find the earlier cases holding that no principle of law compels a seller to take cognizance of the morals of his customers. Later the civil judges displayed a tendency opposite to that of their brethren on the criminal side. They stiffened the rule and made participation turn upon the magnitude of the buyer's wrongful purpose and so upon the nature of the crime. It may be that the same compromise will ultimately be the rule of the Supreme Court." (Italics added) In this case there was ample evidence of "further participation" and so the judgment of the District Court was affirmed. The evidence of "affirmative action" and "further participation" on the part of Direct Sales Company has already been pointed out.

The rule laid down by the Supreme Court in the Falcone case has always been the rule in the Fourth Circuit. *Simpson* v. *United States*, 11 F. (2d) 591; *Fisher* v. *United States*, [fol. 338] 13 F. (2d) 756; *Di Bonaventura* v. *United States*, 15 F. (2d) 494. In the latter case Judge Parker wrote the opinion which simply holds that a landlord is not necessarily guilty of a conspiracy to violate the Prohibition Act merely because he has knowledge that liquor is being manufactured on his premises and does not stop it. In commenting on the trial Court's charge, Judge Parker said, "The learned trial judge evidently had in mind the rule that one who, with knowledge of the existence of a conspiracy, aids in carrying out its design is guilty with the other conspirators; but the trouble is that the portions of the charge complained of authorized a conviction, not upon a finding that a conspiracy existed, and that the landlord, with knowl-

edge of its existence, aided the conspirators in carrying out its purpose, but upon a finding of no more than that liquor was being manufactured on his premises, and that he knew what was going on and did not stop it."

It is evident that the indictment in the Falcone case charged a conspiracy to commit a single offense. The indictment in this case charges a conspiracy to commit several offenses among which is that they conspired to violate that portion of Section 2 of the Act which provides that "It shall be unlawful for any person to obtain by means of said order forms any of the aforesaid drugs for any purpose other than the use, sale, or distribution thereof by him in the conduct of a lawful business in said drugs or in the legitimate practice of his profession." The trial of this case in reality finally resolved itself into the question of whether or not Direct Sales Company and Dr. Tate agreed to violate this provision. The fact that they did violate the section would not prevent their conviction for having conspired to do so as has already been pointed out. Let it be assumed that the other defendants could have successfully maintained that they did not know of this conspiracy between Dr. Tate and the Direct Sales Company. They did not raise the point but plead guilty generally to the indictment. A conviction for having conspired to commit any one of the offenses charged would be good if supported by the evidence. The jury would have been justified in finding that Dr. Tate and Direct Sales Company agreed to violate the [fol. 339] quoted portion of Section 2 and that the other defendants know of such conspiracy and joined it for the defendant Johnson testified that one of the purchases he made from Dr. Tate was in a bottle of the Direct Sales Company. Likewise the jury would have been justified in finding Dr. Tate and Direct Sales Company guilty of an agreement to violate the above quoted portion of Section 2 of the Act and not been concerned at all about the defendants who plead guilty, whether they knew of the conspiracy or not.

For the foregoing reasons the motion for new trial, and the motion for arrest of judgment should be denied.

(Signed) C. C. Wyche, United States District Judge.

Spartanburg, South Carolina, April 24, 1942.

[File endorsement omitted.]

[fol. 340] ORDER DENYING MOTION FOR NEW TRIAL AND MOTION FOR ARREST OF JUDGMENT

On April 29, 1942, an order signed by Judge Wyche, denying appellant's motion for a new trial and arrest of judgment was filed in office of the Clerk of this Court :—

For the reasons stated in an Opinion filed herewith,

It Is Ordered, That the motion of the defendants, Direct Sales Company, Inc., and Dr. John Victor Tate for a new trial and arrest of judgment be and the same is hereby denied.

(Signed) C. C. Wyche, United States District Judge.

Spartanburg, South Carolina, April 29, 1942.

Exception to such order was duly taken on behalf of appellant.

Judgment against appellant was pronounced and filed the 29th day of April, 1942.

On This 29th day of April, 1942, came the United States Attorney, and the defendant, Direct Sales Company, Inc., appearing in proper person, and by counsel, and,

The defendant having been convicted on verdict of guilty 11/13/41 of the offense charged in the indictment in the above-entitled cause, to wit, violation of Section 88, Title 18, U. S. C. A.—Conspiracy to Violate the Harrison Narcotic Act, and the defendant having been now asked whether it has anything to say why judgment should not be pronounced against it, and no sufficient cause to the contrary being shown or appearing to the Court, It Is By The Court,

Ordered And Adjudged that the defendant, having been found guilty of said offenses, is hereby ordered to pay a fine of One Thousand Dollars ($1000.00).

[fol. 341] District Court of the United States, Western District of S. C., Greenwood Division

No. C/8460 Criminal Indictment in One Counts for Violation of U. S. C., Title 18, Secs. 88

United States

v.

Direct Sales Company, Incorporated

Judgment and Commitment—Filed April 29, 1942

On this 29th day of April, 1942, came the United States Attorney, and the defendant Direct Sales Company, Incorporated appearing in proper person, and by counsel and

The defendant having been convicted on verdict of guilty 11/13/41 of the offense charged in the indictment in the above-entitled cause, to wit violation of Section 88, Title 18, U. S. C. A.—Conspiracy to Violate the Harrison Narcotic Act, and the defendant having been now asked whether it has anything to say why judgment should not be pronounced against it, and no sufficient cause to the contrary being shown or appearing to the Court, It is by the Court

Ordered and Adjudged that the defendant, having been found guilty of said offenses, is hereby ordered to pay a fine of One Thousand Dollars ($1,000.00).

(Signed) /s/ C. C. Wyche, United States District Judge.

A True Copy. Certified this 29th day of April, 1942.
(Signed) —— ——, Clerk, by —— ——, Deputy Clerk.

[File endorsement omitted.]

[fol. 342] [File endorsement omitted]

In District Court of the United States for the Western District of South Carolina

[Title omitted]

Order Approving, Settling and Allowing Bill of Exceptions

The foregoing Bill of Exceptions containing Defendant's Plea in Abatement and Demurrer, Opinion of Court Over-

ruling Plea in Abatement and Demurrer, Order of Court Allowing Exception to Ruling of the Court on Plea in Abatement and Demurrer, Transcript of Testimony and Proceedings on Trial, Defendant's Requests to Charge, Motion by Defendant to Set Aside Verdict and For New Trial, Defendant's Motion for Arrest of Judgment, Opinion of the Court on said Motion, Order of Court Denying Motion for New Trial and Arrest of Judgment and Judgment of the Court is here-by approved, settled and allowed.

C. C. Wyche, United States District Judge.

Spartanburg, S. C., July 23, 1942.

[fol. 343] IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed May 1, 1942

Name and address of appellant: Direct Sales Co., Inc., 377 East Genesee Street, Buffalo, New York.

Name and address of appellant's attorney: William B. Mahoney, 405 Walbridge Building, Buffalo, New York.

Offense: Conspiracy to defraud the United States out of its revenues, by committing offenses in violation of Sections 1 and 2 of the Harrison Narcotic Act.

Date of Judgment: April 29, 1942.

Brief description of sentence: Defendant, Direct Sales Inc., was ordered to pay a fine of One Thousand Dollars, ($1000.00).

The above named appellant, Direct Sales Co., Inc., hereby appeals to the United States Circuit Court of Appeals for the Fourth Circuit from the judgment above mentioned on the grounds set forth below.

Direct Sales Co., Inc., by George J. Dotterweich, President, Appellant.

Dated: April 29, 1942.

GROUNDS OF APPEAL

First: The trial court erred in overruling defendant's plea in abatement.

Second: The trial court erred in overruling defendant's demurrer to said indictment.

Third: It was error to permit the testimony of Dr. Coyt [fol. 344] Ham as to the usual dose of morphine administered to any patient and the size of doses of morphine administered by a physician to a patient in the course of his medical profession; also as to the amount of normal doses in 500 grains of morphine.

Fourth: Admission of testimony of J. S. Lanigan against appellant as to transactions between Johnson, an informer, and Dr. Tate on June 16, 1939, was error.

Fifth: Admission of testimony of Albert P. Rogers against appellant as to his transactions with Dr. Tate and the transactions of Ruby LaMar with Dr. Tate in 1939 was error.

Sixth: Admission of testimony of Ruby LaMar against appellant as to her transactions with Dr. Tate in 1939 was error.

Seventh: Admission of testimony of George C. Johnson against appellant as to his transactions with Dr. Tate in 1939; and Clyde A. Foster and Reel B. Black, was error.

Eighth: Admission of testimony of Dorris Cox against appellant as to his purchases from Reel B. Black was error.

Ninth: Admission of testimony against appellant of Agent Bransky as to standard dose of morphine sulphate was error.

Tenth: Admission of testimony against appellant of Dr. Blake as customary dose of morphine in medical profession was error; also Dr. Blake's testimony as to use of codein and the ration of codein used by such doctor as compared to morphine.

[fol. 345] Eleventh: Admission of Government's Exhibit 14 in evidence was error.

Twelfth: It was error for the Court to deny defendant's motion at the close of the Government's case, for a directed verdict of Not Guilty.

Thirteenth: It was error for the Court to deny defendant's motion at the close of the entire case, for a directed verdict of Not Guilty.

Fourteenth: The verdict of the jury was contrary to law and against the weight of evidence.

Fifteenth: It was error for the Court to deny defendant's motion to set aside verdict of jury and in arrest of judgment and to deny defendant's motion for a directed verdict of Not Guilty.

Due and personal service of the within Notice of appeal is admitted this 1st day of May, 1942. O. H. Doyle, U. S. Attorney, by E. P. Riley, Assistant U. S. Attorney.

[fol. 346] In District Court of the United States for the Western District of South Carolina

[Title omitted]

Order Directing Appellant or His Attorney and the United States Attorney to Appear Before the Undersigned Trial Judge for Directions Under Rules VII, VIII, and IX of the Rules of Practice and Procedure in Criminal Cases, Prescribed by the Supreme Court of the United States

It Appearing to the undersigned, Trial Judge, that the appellant on the 1st day of May, 1942, filed with the Clerk of this Court a Notice of Appeal in the above entitled case,

Therefore, in pursuance of the Rules of Practice and Procedure in Criminal Cases adopted by the Supreme Court of the United States on May 7, 1934.

Is is Ordered that the above-mentioned Appellant or his Attorney and the United States Attorney do appear before the undersigned Trial Judge on the 1st day of June, 1942, at the City of Anderson, South Carolina, for such directions as may be appropriate with the respect to the preparation of the record on appeal, including directions for the purpose of making promptly available all necessary transcript of testimony and proceedings; and as to the time for the filing of an assignment of the errors of which the ap-[fol. 347] pellant complains if the record on appeal is to be without a bill of exceptions; as to the preparation and filing of the bill of exceptions and the settlement of the same by the undersigned Trial Judge; as to the contents of the

transcript of record on said appeal and as to the time for the filing of the said record with clerk's certificate in the United States Circuit Court of Appeals for the Fourth Circuit, and as to all other matters pertinent to said appeal.

It is Further Ordered that the Clerk of this Court do forthwith serve a certified copy of this Notice by mail on the Appellant or his Attorney and on the U. S. Attorney for this District.

C. C. Wyche, United States District Judge.

By Mary W. King, Deputy Clerk.

May 2, 1942. Spartanburg, South Carolina.

[fol. 348] In United States District Court

Order Extending Time

A motion having been made by the defendant, Direct Sales Co., Inc., for an order extending its time within which to file a bill of exceptions, assignment of errors and complete the record on appeal, and the said motion having been heard on the 29th day of May, 1942, said time within the thirty days period limited by Rule 9 of the Supreme Court, governing procedure after verdict in criminal cases in District Courts, and upon reading and filing the affidavit of William B. Mahoney, attorney for the defendant, and upon all the papers and proceedings heretofore had herein, and William B. Mahoney having been heard on behalf of said motion for appellant, and Oscar O. Doyle (Mr. Riley of Counsel) having been heard on behalf of the Government of the United States, it is,

Ordered, that the motion of the defendant Direct Sales Company, Inc., be granted and that the time of the defendant to file its bill of exception and assignment of errors is hereby extended to and including the 29th day of July, 1942.

Signed, C. C. Wyche, United States District Judge.

May 29, 1942.

[fol. 349] In United States District Court

Order Directing That the Testimony Be Incorporated in Bill of Exceptions in Question and Answer Form

The questions raised by this appeal are largely questions of the weight of the evidence, whether or not there was sufficient testimony to carry the case to the jury, and I am of the opinion that the record should go to the appellate court in question and answer form and, therefore, pursuant to Rule 10 of the United States Circuit Court of Appeals, Fourth Circuit, and Rule 8 of the Rules of the Supreme Court,

It is Ordered that the testimony in this case should be incorporated in the Bill of Exceptions in question and answer form.

C. C. Wyche, United States District Judge.

Anderson, S. C. June 1, 1942.

We consent:

William B. Mahoney, Attorney for Appellant. O. H. Doyle, United States Attorney, Attorney for the Appellee.

[fol. 350] [File endorsement omitted.]

In District Court of the United States, for the Western District of South Carolina

[Title omitted]

Assignment of Errors—Filed July 23, 1942

Now comes the defendant, Direct Sales Co., Inc., and files the following Assignment of Errors upon which it will rely in the prosecution of its appeal of this case to the United States Circuit Court of Appeals for the Fourth Circuit:

1. The trial court erred in overruling defendant's plea in abatement.

2. The trial court erred in overruling defendant's demurrer to said indictment.

3. It was error to permit the testimony of Dr. Coyt Ham as to the usual dose of morphine administered to any patient and the size of doses of morphine administered by a physi-

cian to a patient in the course of his medical profession; also as to the amount of normal doses in 500 grains of morphine.

4. That the Trial Court erred in admitting the testimony of J. S. Lanigan, an agent, as to transactions between Johnson, an informer, Dr. Tate, and himself on June 16, 1939.

5. That the Trial Court erred in admitting testimony of Albert P. Rogers against appellant as to his transactions as well as those of Ruby LaMar with Dr. Tate in 1939.

[fol. 351] 6. The Trial Court erred in omitting testimony of Ruby LaMar as to her transaction with Dr. Tate in 1939.

7. The Trial Court erred in admitting testimony of George C. Johnson against appellant as to his transactions with Dr. Tate, Clyde A. Foster and Reel B. Black in 1939.

8. The Trial Court erred in admitting testimony of Dorris Cox as to his transactions with Reel Black.

9. The Trial Court erred in admitting testimony of Agent Bransky as to what is the standard dosage of morphine sulphate.

10. The Trial Court erred in admitting testimony of Dr. Blake as to ordinary dosage of morphine by the medical profession; also, as to the ratio of codein dosage as compared with morphine dosage.

11. The Trial Court erred in refusing to grant appellant's motion at the close of the Government's case, to strike out the testimony of the witnesses, Dr. Ham, Inspector Lanigan and Rogers, Ruby LaMar, George Johnson, Dorris Cox, Dr. Blake and that part of Agent Bransky's testimony as to standard dosage, because such testimony was received on condition that it would be connected with defendant, and the Government failed to offer any proof tending to connect the same with the defendant.

12. It was error for the Court to deny defendant's motion at the close of the Government's case, for a directed verdict of Not Guilty.

[fol. 352] 13. It was an error for the Court to deny defendant's motion at the close of the entire case, for a directed verdict of Not Guilty.

14. The verdict of the jury was contrary to law and against the weight of evidence.

15. It was error for Court to deny defendant's motion to set aside verdict of jury and in arrest of judgment and to deny defendant's motion for a directed verdict of Not Guilty.

16. The failure of Trial Court to grant appellant's motion for a directed verdict of Not Guilty resulted in an invasion of appellant's constitutional rights and resulted in an unconstitutional construction of the provisions of the Harrison Narcotic Act as applied to a wholesale distributor.

17. That there was no evidence to sustain the charge of conspiracy against the appellant, in that there was no proof of any agreement by the appellant, either tacit or otherwise, wherein it conspired to violate the provisions of the Harrison Narcotic Act; there was no proof that appellant had any knowledge of Dr. Tate's activities, in or outside the practice of his medical profession; there was no evidence that appellant did not comply with the Narcotic act, the regulations and in addition thereto, the directions and advices of the United States Commissioner of Narcotics and his agents.

[fol. 353] 18. The Court erred in charging the jury that the catalog of appellant was an offer to sell and that when Dr. Tate ordered that such was acceptance of the offer to sell him and amounted to an agreement between appellant and Dr. Tate.

19. The Court erred in its decision on defendant's right for a directed verdict, wherein it said:

"Considering all the facts in connection with the agreement, there was a common purpose and design between the Dr. Tate and defendant to violate the Harrison Narcotic Law. The testimony of the large amounts that were sent to him and the frequency, together with the contract made between them of the purchase and sale, in my opinion probably make it an issue for the jury." The instruction was erroneous as to the making of an agreement, and the law is well established that frequency and amount are insufficient to sustain a charge of conspiracy.

20. The Court erred in charging the jury "but such charge may be sustained by evidence showing concert of action in the commission of the unlawful act or * * *."

21. The Court erred in charging the jury "You are to inquire first in this case whether the prescriptions on doses alleged to have been given to these people named in the indictment, Johnson, Black, and the others I don't recall, were issued by the physician, Dr. Tate, in the course of his professional practice only, or were the prescriptions issued to said persons to satisfy the appetites and cravings * * *."

[fol. 354] 22. The Court erred in charging jury as to amount of morphine sulphate which could be administered as follows: "The quantity given is not to be considered by you, unless the testimony shows that there was such an enormous amount that it could be used only for satisfying the craving of addicts or for its sale to persons unlawfully.

23. The Court erred in its charge "Now I charge you that before you can convict these defendants—and you have to convict both; you cannot convict one; you must convict two or more * * *."
This was manifest error because Court at page 260 of stenographers minutes said "and you have under consideration in this case only the indictment as to Dr. John Victor Tate and the Direct Sales Company * * *."

24. The Court erred, for a second time, in last part of following charge "No burden rests upon the defendants to prove their innocence, and as I say, you cannot convict one without both."

25. The Court erred in failing to charge by appellant as requested, as to frequency of sales, as follows: "Gentlemen, I charge you in that connection that evidence of frequent sales, of itself would not be enough, but you have the right to take that into consideration, together with all the other circumstances in the case, to ascertain whether or not there was an unlawful conspiracy, as alleged."

[fol. 355] 26. The Court erred in refusing to charge as requested by appellant, that evidence of sales in amount of 1000, in and of itself, is insufficient to warrant a verdict of guilty. The Court: I charge you that Gentlemen, with the addition that you have the right to take, that with consideration, together with all other facts and circumstances of the case, as to whether or not the conspiracy alleged in the indictment has been proved beyond a reasonable doubt.

27. The Court erred in refusing to charge that the method of advertising is not evidence of conspiracy and charging "I charge you, Gentlemen of the Jury, that the manner of advertising is a circumstance which you can take into consideration in connection with all other facts and circumstances as to whether or not the conspiracy alleged has been proven beyond a reasonable doubt.

Wherefore, the defendant, Direct Sales Company, Inc., prays that said judgment and sentence of the United States District Court for the Western District of South Carolina, because of the errors above set forth, be reversed and that the indictment be dismissed or remanded to the District Court for another trial.

William B. Mahoney, Attorney for Defendant, Direct Sales Company, Inc.

[fol. 356] [File endorsement omitted]

CLERK'S STATEMENT OF DOCKET ENTRIES TO BE FORWARDED UNDER RULE IV

(To accompany duplicate notice of appeal to the United State Circuit Court of Appeals.)

District Court of the United States for the Western District of South Carolina

UNITED STATES OF AMERICA

vs.

DIRECT SALES CO., INC., et al. (Direct Sales Company, Inc. only appellant)

1. Indictment or information for violation of Section 88, Title 18, U. S. C. A.—Conspiracy to violate the Harrison Narcotic Act filed May 26, 1941.

2. Arraignment waived.

3. Plea to indictment or information Plea of Not Guilty November 10, 1941.

4. Motion to withdraw plea of guilty denied ——, 19—.

5. Trial by jury, or by court if jury waived Trial by Jury November 10th to Nov. 13, 1941.

6. Verdict or finding of guilty Verdict of Guilty rendered Nov. 13, 1941.

7. Judgment—(with terms of sentence) ordered to pay a ne of One Thousand Dollars ($1,000.00) entered April 29, 42.

8. Notice of appeal filed May 1, 1942.

Date May 2, 1942.

Attest: W. D. White, Clerk.

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ol. 357] [File endorsement omitted]

DISTRICT COURT OF THE UNITED STATES, WESTERN DISTRICT OF SOUTH CAROLINA

[Title omitted]

STIPULATION AS TO RECORD—Filed July 23, 1942

t is hereby stipulated by and between counsel for the pellant and counsel for the appellee that the Clerk of s Court shall make up and transmit to the Clerk of the ited States Circuit Court of Appeals for the 4th Circuit transcript of record on appeal herein which shall con- of the following:

. Indictment.
. Introductory statement.
. Plea in Abatement, filed by defendant.
. Demurrer of defendant.
. Opinion of Court overruling demurrer and allowing ptions.
. Bill of Exceptions in question and answer form.
. Defendant's requests to his charge.
. Motion by defendant to set aside verdict and for di- ing verdict of non guilty and in arrest of judgment.
. Opinion of Court on said motion.
. Order denying motion for a new trial and in arrest dgment.
. Judgment of the Court.
. Notice of Appeal.
. Order directing appellant's counsel and United States rney to appear for instructions.

358] 14. Order extending appellant's time within h to file Bill of Exceptions and Assignment of Errors.

15. Order directing that Bill of Exceptions be filed in question and answer form.
16. Appellant's Assignment of Errors.
17. This stipulation.
18. Clerk's memorandum.
19. Certificate.

William B. Mahoney, Attorney for Direct Sales Co., Inc., Appellant. Oscar H. Doyle, United States Attorney, Attorney for Appellee.

[fol. 359] MEMORANDUM

Notice of Appeal filed May 1, 1942.

[fol. 360] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 361] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 4956

DIRECT SALES COMPANY, INC., Appellant,

versus

UNITED STATES OF AMERICA, Appellee

Appeal from the District Court of the United States for the Western District of South Carolina, at Greenville

DOCKET ENTRIES

May 4, 1942, duplicate notice of appeal is filed and the cause is docketed.

Same day, Clerk's Statement of Docket Entries is filed.

May 8, 1942, the appearance of Oscar H. Doyle, U. S. Attorney, and E. P. Riley, Assistant U. S. Attorney, is entered for the appellee.

May 25, 1942, the appearance of William B. Mahoney is entered for the appellant.

Same day, motion and order extending the time to July 29, 1942, to file bill of exceptions and assignments of error are filed.

August 3, 1942, the transcript of record is filed.

September 4, 1942, waiver of rule as to the time for the filing of appellant's brief is filed.

October 1, 1942, brief and appendix on behalf of the appellant are filed.

Same day, brief and appendix on behalf of the appellee are filed.

IN UNITED STATES CIRCUIT COURT OF APPEALS

MINUTE ENTRY OF ARGUMENT

October 5, 1942, (October term, 1942) cause came on to be heard before Parker, Dobie and Northcott, Circuit Judges, and was argued by counsel and submitted.

[fol. 362] IN UNITED STATES CIRCUIT COURT OF APPEALS,
FOURTH CIRCUIT

No. 4956

DIRECT SALES COMPANY, INC., Appellant,

versus

UNITED STATES OF AMERICA, Appellee

Appeal from the District Court of the United States for the Western District of South Carolina, at Greenville

(Argued October 5, 1942. Decided November 12, 1942)

Before Parker, Dobie and Northcott, Circuit Judges

WILLIAM B. MAHONEY for Appellant, and OSCAR H. DOYLE, United States Attorney, (Edward P. Riley, Assistant U. S. Attorney, on Brief) for Appellee

OPINION—Filed November 12, 1942

NORTHCOTT, Circuit Judge:

Appellant, Direct Sales Company, Inc., with four others, was indicted in the District Court of the United States for the Western District of South Carolina charged with the

[fol. 363] crime of conspiring to violate the Harrison Narcotic Act. (Section 88 Criminal Code). A plea in abatement and demurrer were interposed by the appellant and after argument the plea in abatement was denied and the demurrer overruled.

Two of those indicted pleaded guilty and a severance was granted as to another of the defendants. In November 1941 a trial was had at Greenwood, South Carolina, before a jury as to the appellant and the other defendant.

At the conclusion of the Government's evidence a motion was made on behalf of the appellant for a directed verdict and decision on the motion was reserved by the trial judge. This motion was renewed at the close of the entire case and was denied with exception to the appellant.

The jury returned a verdict of guilty as to the appellant and one Dr. John V. Tate. Motions to set aside the verdict and in arrest of judgment were made on behalf of the appellant. These motions were denied by the judge below who rendered an able and exhaustive opinion. Judgment was pronounced fining the appellant the sum of One Thousand Dollars. From this action this appeal was brought.

Direct Sales Company is a corporation, having its principal place of business at Buffalo, New York, and is a manufacturer of and a wholesale dealer in drugs, including narcotics, and at the times mentioned in the indictment was registered as such under the provisions of the Harrison Narcotic Act. Dr. John Victor Tate is a physician residing at Calhoun Falls, South Carolina, and was at the times mentioned in the indictment, registered under provisions of the Act in his proper class. The defendant Johnson was a resident of Augusta, Georgia, and defendants Foster and Black were residents of Spartanburg, South Carolina. Neither of them had been registered or had paid the special tax in any class under the provisions of the Act.

The Direct Sales Company, as its name implies, sells directly to the customer. It has no travelling representatives. It solicited the business of Dr. Tate by means of catalogs and circulars sent to him every ten days. The [fol. 364] catalog used by this defendant is an ordinary pamphlet printed in black type on white paper, and a great number of preparations are listed in it. Narcotics, however, are not listed in the catalog itself. This defendant's uniform practice, during the period alleged in the indictment, was to insert into the catalogs a sheet of paper ap-

proximately four inches wide by five and one-half inches long, sometimes colored pink and sometime blue, on which was listed morphine sulphate. It offered tablets of morphine sulphate for sale in lots of five hundred, one thousand and five thousand one-quarter and one-half gram tablets. The prices were from thirty to forty per cent, less than could be obtained elsewhere.

The evidence disclosed that from the month of December 1937 to the month of January 1940 the appellant shipped to Dr. Tate the enormous quantity of 79,000 one-half grain morphine sulphate tablets. As many as 6,000 one-half grain tablets were shipped by the appellant to Dr. Tate in the one month of July 1939.

The evidence of the Government's witnesses was that one-fourth grain was the usual dose given by doctors to their patients and that one-half grain was usually used by addicts.

It seems too clear for argument that Dr. Tate could not possibly have used anything like the quantity of morphine, shipped him by the appellant, in his legitimate practice as a doctor in a small town. The only way Dr. Tate could lawfully dispose of the morphine was to administer it to his patients, as he could not legally sell it or give it away.

That he could legitimately use 6,000 one-half grain tablets or 12,000 normal doses in one month was inconceivable. To use that amount legitimately he would have had to give 400 doses every day to his patients.

Knowing, as its officers must have known, in conducting its business as a dealer in drugs, that Dr. Tate was disposing of the drug in violation of the law they continued the large shipments of the morphine to him and thereby became a party to his illegal acts. This undoubtedly amounted to an unlawful conspiracy as charged in the indictment. Not [fol. 365] only did the company continue these shipments knowing they could be used for no lawful purpose but it repeatedly and regularly solicited from Dr. Tate his orders.

This case appears to be unique in that the indictment charges a conspiracy to violate the Harrison Act between a wholesale dealer in drugs and a practicing physician. Appellant must have known that Dr. Tate lived and practiced his profession in a small town. It is worthy of note, too, that on one of the lists of doctors who had been convicted of violating the Harrison Act (furnished by the United States to dealers in narcotic drugs), more than one-quarter

of the doctors listed were customers of appellant. Then there is the further fact that appellant had agreed with federal officers not to make a single sale of more than a specified quantity of narcotic drugs; yet, when Dr. Tate sent in one order for more than the agreed quantity, appellant shipped this maximum quantity and merely asked Dr. Tate to make out a new form for the excess. This was a clear violation of the spirit of the agreement. Under these facts, the instant case is clearly distinguishable from *United States* v. *Falcone*, 311 U. S. 205.

An unlawful agreement need not be shown to exist in any formal way. It is a rare thing that an unlawful agreement can be so shown. A mutual understanding between the parties or any two or more of them is all that is necessary to prove conspiracy. *United States* v. *Wilson* (D. C. W. Va.), 23 F. 2d 112; *Fisher* v. *United States*, (C. C. A. 4th), 13 F. 2d 756.

An exhaustive analysis of the authorities is found in the opinion of the judge below denying the motion for a new trial and we agree fully with his reasoning and his conclusion that the evidence was sufficient to support the verdict of the jury.

There is no merit in any of the points raised by the appellant as to the admission of evidence or the charge of the judge to the jury and they are not worthy of discussion.

Affirmed.

[fol. 366] In United States Circuit Court of Appeals
Fourth Circuit

No. 4956

Direct Sales Company, Inc., Appellant,

vs.

United States of America, Appellee

Appeal from the District Court of the United States for the Western District of South Carolina.

Judgment—Filed and entered November 13, 1942

This Cause came on to be heard on the transcript of the record from the District Court of the United States for the

Western District of South Carolina, and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

John J. Parker, Senior Circuit Judge.

November 13, 1942.

In United States Circuit Court of Appeals

Minute Entry of Issuance of Mandate—November 25, 1942

On another day, to-wit, November 25, 1942, the mandate of this Court, in this cause, is issued and transmitted to the District Court of the United States for the Western District of South Carolina, at Greenville, in due form.

[fol. 367] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 368] Supreme Court of the United States, October Term, 1942

No. 593

Order Allowing Certiorari—Filed March 1, 1943

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 593

DIRECT SALES COMPANY, INC.,
Petitioner,

vs.

THE UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

EDWIN J. CULLIGAN,
Counsel for Petitioner.

WILLIAM B. MAHONEY,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 593

DIRECT SALES COMPANY, INC.,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

The petitioner, Direct Sales Company, Inc., a New York corporation, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Fourth Circuit entered in the above-entitled cause on November 13, 1942, affirming a judgment of conviction of the appellant in the District Court of the United States for the Western District of South Carolina.

Opinions Below.

1. An opinion written by the Hon. C. C. Wyche, District Judge (R. 21), is reported in 40 F. Supp. 917.

2. An opinion written by the Hon. C. C. Wyche, District Judge, on petitioner's motion after verdict (R. 242), is reported in 44 F. Supp. 623.

3. The opinion of the Circuit Court of Appeals (R. 266), is not yet reported.

Jurisdiction.

The judgment, affirming the conviction of the petitioner, by the Circuit Court of Appeals for the Fourth Circuit, was entered November 13, 1942 (R. 269). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, as well as Rule XI of the Criminal Appeals Rules, promulgated by this Court on May 7, 1934.

Questions Presented.

1. Whether there was sufficient evidence to sustain petitioner's conviction of conspiracy to violate the Harrison Narcotic Act.

2. Whether sales of morphine sulphate tablets by petitioner, a New York manufacturer and wholesaler of drugs, to a South Carolina physician, both licensed by Government, pursuant to Act, in substantial amounts at frequent intervals, is sufficient to show "knowledge" of a conspiracy on the part of petitioner.

3. Whether petitioner was not entitled to a directed verdict of not guilty, because there was no evidence to show that it performed any act with knowledge of any conspiracy between Dr. Tate and others.

4. Whether petitioner was not entitled to a directed verdict of not guilty because its manner of sales, both as to quantity and frequency, were pursuant to written instructions of Commissioner of Narcotics and his agents.

Statute Involved.

Section 37 of the Criminal Code (U. S. C., Title 18, Sec. 88), so far as pertinent, provides

If two or more persons conspire * * * to commit any offense against the United States * * * and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000.00, or imprisoned not more than two years, or both.

Statement.

In May, 1940 (R. 1), the petitioner, a New York corporation, together with Dr. John V. Tate, a practicing physician in Calhoun Falls, S. C., and three others, were indicted in the District Court for the Western District of South Carolina. The indictment, in a single count, charged a conspiracy to defraud the United States of its revenues by obtaining large quantities of morphine sulphate by use of official order forms for purposes other than in the conduct of a lawful business in said drugs or in the legitimate practice of medicine. Fifty-three overt acts were alleged (R. 3).

Two of the defendants, George C. Johnson and Reel Black, pled guilty before trial (R. 33); the defendant Clyde A. Foster proceeded to trial but a severance was granted to him during the progress of the trial because of his illness (R. 145).

The petitioner, at the close of the Government's case, moved for a directed verdict of not guilty, on the ground that the evidence was insufficient to establish conspiracy against it. Decision was reversed on such motion (R. 183-184). This motion was renewed at the conclusion of the entire case; said motion was denied and exception taken (R. 223-224). The petitioner and Dr. Tate were convicted

and the former was directed to pay a fine of $1,000. On appeal by petitioner, the Circuit Court of Appeals for the Fourth Circuit affirmed the conviction.

The petitioner, a New York corporation, having its only place of business in the City of Buffalo, New York, is a manufacturer and wholesaler of drugs, and was duly registered as such under the provision of the Harrison Narcotic Act during the time mentioned in the indictment. Dr. Tate was a physician residing at Calhoun Falls, S. C., and was duly registered as such under the Harrison Narcotic Act. The petitioner is a direct mail order concern, having no traveling representatives whatsoever. It published catalogs containing numerous pharmaceutical products as well as narcotic preparations, and listed the price of narcotics in lots of one hundred to five thousand one-quarter grain and one-half grain tablets. In the latter part of 1940, pursuant to correspondence from the Office of the Commissioner of Narcotics, the petitioner changed the form of his catalog and took the narcotic items from the general listing and listed them on a separate sheet (R. 92, 200-201).

It should be noted that both the Trial Judge, in his opinion in denying a motion for a new trial, as well as the Circuit Court, based their opinions on an erroneous interpretation of the evidence. The Trial Judge, in his opinion, stated that narcotics were not listed in the catalog itself, and that petitioner's uniform practice, during the period alleged in the indictment, was to insert a colored sheet of paper, on which was listed morphine sulphate (R. 243). The Circuit Court, in its opinion, copied the exact phraseology of the Trial Court's opinion (R. 267-268), and as a result both were in error, inasmuch as the evidence shows that petitioner did not separate the narcotic list from the general listings in the catalog until late 1940 (R. 201), which was subsequent to the period alleged in the indictment.

Under the Statute, Dr. Tate could not order narcotics without obtaining official order forms from the Collector of Internal Revenue in his district (R. 85); nor could petitioner sell or deliver narcotics without the receipt of an official order form properly endorsed and properly executed (R. 184-185); also, petitioner files a report every thirty days in the office of the Collector of Internal Revenue at Buffalo, New York, showing names of persons to whom narcotics were sold and the amount, and which included Dr. Tate's name (R. 186-187).

The Government did show frequent and numerous sales by petitioner to Dr. Tate, pursuant to official order forms, between 1937 and 1940. The evidence shows that Narcotic Agent Bransky inspected the methods of petitioner at its office, in August and September, 1936; that there was presented to such agent, for inspection, the official order forms received by petitioner from Dr. Tate from January 1, 1936 to June 19, 1936, which amounted to nine in number and ordered in the aggregate 6700 one-half grains of morphine sulphate (R. 135, 136), petitioner's exhibit 4; also, during August and September, 1936, while Agent Bransky was at petitioner's plant, he requested that all orders for narcotics be placed on his desk so that he could see the quantities being purchased by registrants (R. 136-137), that during such period, two orders were received from Dr. Tate for 600 and 800 half grains of morphine sulphate (R. 137), petitioner's Exhibit 5; that as a result of such inspection, Agent Bransky prepared and delivered to petitioner a table setting forth the quantity that petitioner could fill on any one order to physicians, hospitals, sanitariums and others (R. 151, 152, petitioner's exhibit 14); and on October 20, 1936, after the departure of Agent Bransky from petitioner's office, Commissioner of Narcotics Anslinger sent petitioner a letter, informing it that it could fill physicians official order

forms up to 1,000 half grain tablets, but on all orders in excess of such amount to withhold fulfillment and communicate with the Commissioner for instructions (R. 159, petitioner's exhibit 20); the Government's case admitted that Agent Bransky asked petitioner's officer to limit the sale of tablets of morphine sulphate to 1,000 half-grain tablets to each order form, to which suggestion petitioner assented (R. 126).

Dr. Tate, sworn as a witness for the Government, admitted that he had never seen the petitioner's president prior to the date of trial, November 10, 1941 (R. 106); that he never conversed with any of its officers and that his only contact with petitioner was through the medium of the official order form (R. 108).

It is therefore apparent that during the indictment period the petitioner was selling to 14,400 doctors, whose names were contained on their mailing list, throughout the United States (R. 139).

It thus appears that the Government, in its prosecution, as well as the Trial Court and the Circuit Court in its opinions and decisions, proceeded on an erroneous interpretation of the evidence as to the slip containing narcotics being separate and apart from the catalog itself. Stripped of this error, the evidence presented a situation where a licensed manufacturer and wholesaler had sold to a licensed physician, only on official order forms, a quantity of morphine sulphate tablets at frequent intervals. This surely was a total failure on the part of the Government to prove the essential elements of conspiracy. Not one word of testimony was elicited to show that petitioner had any connection with the illegal sales by Dr. Tate to other alleged co-conspirators. In fact, the proof, by petitioner's officer, was to the effect that the size of the sales could be justified by a doctor's use of the same hypodermically, orally or as medicating tablets (R. 216), and said officer further testified

that in making a gallon of cough syrup, a doctor would use 96 quarter grain tablets (R. 218).

The District Court was doubtful of the sufficiency of the evidence to entitle submission of the case to the jury and stated, in denying petitioner's motion for a directed verdict, that if a novel question was not involved, it might be inclined to grant petitioner's motion. Further, that it thought that there was a question involved that ought to be settled by the Circuit Court (R. 224).

Specification of Errors to be Urged.

The Circuit Court of Appeals erred:

1. In sustaining the action of the District Court in denying defendant's motion for a directed verdict of not guilty, both at the close of the Government's case and again at the close of the entire case.

2. In refusing to rule that the District Court should have granted petitioner's motion to set aside verdict and for a new trial.

3. In holding that the decision of *United States* v. *Falcone*, 311 U. S. 205, is inapplicable to the case at bar.

4. In holding that the evidence was sufficient to support the verdict of the jury.

5. In holding that petitioner violated its agreement with Narcotic Commissioner, when upon receipt of an order from Dr. Tate for more than the agreed quantity, it shipped the maximum specified and asked Dr. Tate to make out a new form for the excess. A reading of Government's exhibit 4 will confirm this error.

6. The Court erred in its charge to the jury that they had to convict both defendants, they could not convict one.

Reasons for Granting the Writ.

I.

The decision of the Court below appears to be in direct conflict with the decision of the Eighth Circuit holding that the act does not place upon a druggist the burden of inquiry into the intent and purpose of the physician in issuing the prescription, to the contrary it expressly authorizes the druggist to sell on prescriptions issued by registered physicians. *Echert* v. *United States*, 7 F. (2d) 257.

The Circuit Court of Appeals in its opinion (R. 269), expressly stated that the facts of the instant case are distinguishable from *United States* v. *Falcone*, 311 U. S. 205, but failed to point out the evidence constituting the so-called distinguishing features.

It would appear that the decision of the Court below is in conflict with the decisions holding that those having no knowledge of the conspiracy are not conspirators, *United States* v. *Hirsch*, 100 U. S. 33; *Weniger* v. *United States*, 47 F. (2d) 692; and that one who without more furnishes supplies to an illicit distiller is not guilty of conspiracy even though his sale may have furthered the object of a conspiracy to which the distiller was a party but of which the supplier had no knowledge.

These decisions by analogy seem directly applicable to petitioner as a manufacturer and wholesale supplier.

II

This case involves a question of tremendous importance in the administration of the provisions of the Harrison Narcotic Act, and should be finally determined by this Court. This is a test case instituted by the Government to obtain a construction of the Harrison Narcotic Act, as applied to manufacturers and is the first case of its kind to be brought

to the attention of this Court. If the decision of the lower Court is allowed to stand, the petitioner would feel constrained to carry on business in the territory embraced by the Fourth Circuit, whereas in the Second, Fifth and Eighth Circuits there would be no reason for curtailment of such business. Further, as a result of the Court's interpretation, the Commissioner of Narcotics has caused manufacturers to refuse to sell opium and its derivatives to petitioner, which threatens to terminate petitioner's business.

III

The Circuit Court of Appeals, in affirming judgment of conviction, held in effect that there was evidence which warranted the submission of the case to the jury. However, the Court below not only failed to point out evidence which would sustain such conclusion, but adopted the error of the Trial Court, relative to the narcotic slips in the catalog, in attempting to justify its affirmance. The petitioner contends that the record contains no such evidence.

Conclusion.

For the reasons stated, the writ should issue as herein prayed.

December 1942.

DIRECT SALES COMPANY, INC.,
By GEORGE J. DOTTERWEICH,
President.

STATE OF NEW YORK,
County of Erie,
City of Buffalo, ss:

George J. Dotterweich, being duly sworn, deposes and says that he is the president for the petitioner in the above-entitled matter; that the foregoing petition is true

to his own knowledge except as to the matters as therein stated to be alleged on information or belief and that as to those matters, he believes it to be true.

GEORGE J. DOTTERWEICH.

Sworn to before me this 7th day of December, 1942.

WILLIAM B. MAHONEY,
Notary Public, Erie County.

EDWIN J. CULLIGAN,
Counsel for Petitioner,
Liberty Bank Building,
Buffalo, New York.

Of Counsel:

WILLIAM B. MAHONEY,
405 Walbridge Building,
Buffalo, New York.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 593

DIRECT SALES COMPANY, INC.,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinion Below.

The opinion of the Circuit Court of Appeals for the Fourth Circuit has not been officially reported. The opinion of the Circuit Court was rendered November 12, 1942 (R. 266).

Jurisdiction.

The judgment of the Circuit Court of Appeals affirming the conviction of petitioner was entered November 13, 1942 (R. 269). The jurisdiction of this Court is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925; as well as Rule XI of the Criminal Appeals Rules, promulgated by this Court on May 7, 1934.

Questions Presented.

1. Whether there was sufficient evidence to sustain petitioner's conviction of conspiracy to violate the Harrison Narcotic Act.

2. Whether sales of morphine sulphate tablets by petitioner, a New York manufacturer and wholesaler of drugs, to a South Carolina physician, both licensed by Government, pursuant to Act, in substantial amounts at frequent intervals, is sufficient to show "knowledge" of a conspiracy on the part of petitioner.

3. Whether petitioner was not entitled to a directed verdict of not guilty, because there was no evidence to show that it performed any act with knowledge of any conspiracy between Dr. Tate and others.

4. Whether petitioner was not entitled to a directed verdict of not guilty because its manner of sales, both as to quantity and frequency, were pursuant to written instructions of Commissioner of Narcotics and his agents.

Statutes Involved.

Section 37 of the Criminal Code (U. S. C., Title 18, Sec. 88), so far as pertinent, provides

> "If two or more persons conspire * * * to commit any offense against the United States * * * and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000.00, or imprisoned not more than two years, or both."

Section 332 of the Criminal Code (U. S. C., Title 18, Sec. 550) provides

> "Whoever directly commits any act constituting an offense defined in any law of the United States, or aids,

abets, counsels, commands, induces, or procures its commission, is a principal."

Article III of Joint Narcotic Regulations made by Commissioner of Internal Revenue with approval of Secretary of Treasury, effective January 1, 1928, provides

> "Correspondence: Correspondence relative to interpretation of the law and these regulations may be addressed to the Commissioner of Prohibition, Washington, D. C. Inquiries relative to registration and requests for blank forms should be addressed to the various collectors of internal revenue. * * *."

Statement.

In May 1940, the petitioner, Dr. John V. Tate, and three others were indicted in the Western District of South Carolina (R. 1). The indictment charged, in a single count, a conspiracy to defraud the United States of its revenues by violating the provisions of the Harrison Narcotic Act. The substance of the indictment was that the petitioner and Dr. John V. Tate, through the use of official order forms, would secure large quantities of morphine sulphate for purposes other than in the conduct of a lawful business in said drugs or in the legitimate practice of medicine, during a period from 1933 to June 1940 (R. 2). Two of the defendants pleaded guilty and a severance was granted as to a third defendant (R. 145). Dr. John V. Tate pleaded not guilty but appeared as a witness on behalf of the Government (R. 84). The case was submitted to the jury as to petitioner and Dr. John V. Tate, and both were convicted (R. 239); the petitioner was sentenced to pay a fine of $1,000.00 and no disposition was made as to Dr. Tate's matter (R. 253).

On appeal by the petitioner only, the Circuit Court of Appeals for the Fourth Circuit affirmed the conviction (R. 269); the Circuit Court held that the evidence was

sufficient to support the verdict of the jury and that it, petitioner, must have known, because of the quantity sold, that Dr. Tate was disposing of the morphine sulphate in violation of the law.

The petitioner's guilt was based upon the following evidence:

Petitioner is a New York corporation, engaged in the mail order business of a manufacturer and wholesale dealer in narcotics and registered under the provisions of the Harrison Narcotic Act (R. 1). Dr. John V. Tate is a physician practicing in Calhoun Falls, South Carolina and duly registered under the provisions of the Harrison Narcotic Act (R. 1). The other three defendants were residents of Georgia and South Carolina and were not registered under the provisions of said Act (R. 2).

The petitioner sells directly to the customer, the majority of whom are on a mailing list of physicians throughout the United States, in the number of 14,400 (R. 139); it has no traveling representatives but solicited business by means of catalogs and circulars (R. 92). The catalogs were of pamphlet size, containing a list of pharmaceutical supplies and narcotics with the order number and price per article or lot sale of same.

During the time of the indictment, the catalog did not contain a separate sheet of paper, in pink or blue color, listing narcotics (R. 92), as set forth in opinion of Trial Judge (R. 243) and opinion of Circuit Court (R. 267-268).

Dr. Tate, a physician at Calhoun Falls, South Carolina, who was registered with the Collector of Internal Revenue under the Harrison Narcotic Act (R. 1), purchased by means of official order forms various amounts of morphine sulphate from petitioner. These forms were required to be executed by physician in duplicate, the original forwarded to wholesaler and the duplicate kept by physician for a period of two years (R. 85-86, Govt. Ex. 2). Dr.

Tate's last purchase from petitioner was May 24, 1940 (R. 99, defendant's exhibit 1).

Various purchass of morphine sulphate were made by Agent Rogers, informer LaMarr and the defendant George C. Johnson from Dr. Tate (R. 42, 49, 59). Dr. Tate never conversed with anyone connected with petitioner and it had no information as to sales being made by Dr. Tate (R. 108-109).

In August-September, 1936, narcotic agent Bransky conducted an inspection of petitioner's manufacturing establishment at the direction of the Commissioner of Narcotics (R. 119). He furnished petitioner with a list of names of doctors who had been convicted as violators of the Narcotic Law (R. 121, Govt. Ex. 6). He requested that the lists in the catalogs be reduced from 5,000 to 1,000 and petitioner complied with this request and reprinted its catalog (R. 124, 130). Agent Bransky examined all narcotic orders received by petitioner between January 1, 1936 and June 30, 1936 (R. 132), and these included nine official order forms aggregating 6,700 half grain morphine tablets (R. 135-136, Defendant's exhibit 4). He also directed petitioner's employees to submit all order forms for narcotics to him; among these were two from Dr. Tate within seventeen days for 1,400 half grain morphine sulphate tablets; he made no objection to these orders (R. 137-138, Defendant's exhibit 5). After delivery of letter of August 12, 1936 to petitioner (Govt's Ex. 6), Bransky repeatedly removed the names of doctors from such alleged list as well as from other black lists delivered to petitioner (R. 141, Defendant's Exs. 6, 7, 8, 9, 11, 12, 13); this removal was pursuant to instructions from Commissioner of Narcotics (R. 143).

Bransky, in 1936, while at the office of petitioner, prepared an approved schedule setting forth the quantities of morphine sulphate tablets which could be dispensed to doctors, druggists and hospitals on any one order (R. 151-

152, Defendant's exhibit 14). This schedule set the number to be sold to a doctor on any one order at 1,000 tablets and in reply to Court's inquiry "That was 1,000 tablets for what period?", he answered, "There wasn't any period set" (R. 152).

Commissioner of Narcotics Anslinger sent a letter to petitioner dated October 20, 1936, wherein he stated "It is also suggested that no physician or other practitioner be supplied in excess of 1,000 one-half grain tablets or their equivalent in tablets of other size, or one ounce of cube morphine on any one order * * *" (R. 159, Defendant's Ex. 20).

Dr. Tate's name did not appear on any list sent by Commissioner of Narcotics to petitioner (R. 155-156, Defendant's Exs. 6, 7, 8, 9, 10, 11, 12, 13, 15, 17 and 18); in fact, the District Attorney conceded that Dr. Tate's name was not on any of the lists (R. 156).

Ruth Gertz, office manager of petitioner, produced evidence that petitioner submitted monthly reports to Collector of Internal Revenue; that these reports set forth the amount of each sale during the period covered in the indictment (R. 187); that there are 14,400 doctors' names in the files of petitioner and after receipt of Government's Ex. 5, petitioner marked every card which compared with the names on said exhibit "No Narcotics" (R. 188). Since 1937, petitioner, at request of district inspector, made out a daily list of all sales of narcotics made to doctors of 500 grains or more; these were sent in weekly (R. 189).

George Dotterweich, president of petitioner, had a conversation with Agent Bransky wherein the latter placed a limitation of 1,000 tablets of morphine sulphate to a doctor on any one order and then gave to him Defendant's Exhibit 14 (R. 199). The Narcotic Bureau corresponded with petitioner in late 1940 and suggested that petitioner offer no discount. This request was complied with and petitioner

took the narcotics out of the general listing and listed them on a separate sheet (R. 201). He also stated that a doctor could use such tablets hypodermically, orally or as medicating tablets and that 48 one-half grain tablets would be used in making one gallon of cough syrup (R. 216-218).

The Circuit Court of Appeals held that the evidence was sufficient to submit to the jury and also to support the verdict of guilt. The decision was supported on one ground that petitioner repeatedly and regularly solicited Dr. Tate's orders by means of a pink or blue slip, which it concluded was a means of stimulating narcotics sales only. The Court was in error because such slip was not inserted until after the end of the indictment (R. 201). The Court also held that because of the fact that Calhoun Falls, South Carolina was a small town and the sales by petitioner to Dr. Tate were frequent and substantial in quantity, it therefore knew that Dr. Tate was disposing of the drug in violation of the law and by continuing shipments, it became a co-conspirator with him (R. 268). The Court also stated "When Dr. Tate sent in one order for more than the agreed quantity, appellant shipped this maximum quantity and merely asked Dr. Tate to make out a new form for the excess. This was a clear violation of the spirit of the agreement" (R. 269). An examination of Government's Exhibit 4 (letter from petitioner to Dr. Tate as to such order) shows that Dr. Tate was directed "to re-order this on a New Narcotic Order blank when your present supply is nearly exhausted."

Specifications of Errors to be Urged.

The Circuit Court of Appeals erred:

1. In sustaining the action of the District Court in denying defendant's motion for a directed verdict of not guilty, both at the close of the Government's case and again at the close of the entire case.

2. In refusing to rule that the District Court should have granted petitioner's motion to set aside verdict and for a new trial.

3. In holding that the decision of *United States* v. *Falcone*, 311 U. S. 205, is inapplicable to the case at bar.

4. In holding that the evidence was sufficient to support the verdict of the jury.

5. In holding that petitioner violated its agreement with Narcotic Commissioner, when upon receipt of an order from Dr. Tate for more than the agreed quantity, it shipped the maximum specified and asked Dr. Tate to make out a new form for the excess. A reading of Government's Exhibit 4 will confirm this error.

6. The Court erred in its charge to the jury that they had to convict both defendants, they could not convict one.

7. In holding that petitioner solicited business of Dr. Tate throughout period of indictment by means of a separate pink or blue slip, which contained only narcotic preparations, the purpose of which was to stimulate sales of narcotics.

Summary.

The Court below came to the conclusion that because Dr. Tate was a practitioner in a small town and the sales by petitioner were not within a reasonable limit, that therefore it must have known that Dr. Tate was disposing of such morphine sulphate in violation of the Act.

The Circuit Court, in adopting, verbatim, the phraseology of the Trial Judge in his decision in denying the motion to set aside the verdict, committed the same error as the Trial Judge and such adoptions would indicate an unfamiliarity on the part of the Circuit Court as to the actual facts of the case.

No limit has been placed by Congress upon sales by manufacturers to register physicians and it seems illogical, as well as illegal, that the Courts would allow a jury to read into an Act what is or is not reasonable.

The direct evidence is to the effect that petitioner had no knowledge of Dr. Tate's disposition of the drug delivered to him (R. 109). Mere quantity and frequency of sales would not overcome such direct evidence and prove knowledge of a conspiracy, beyond a reasonable doubt on the part of petitioner.

There is not an iota of proof that petitioner knew of any sale by Tate to another. The elements of intent, namely, "promoting the venture, making it his own, having a stake in its outcome", are lacking in this case.

There was no proof that petitioner knew that Dr. Tate was selling to anyone not registered under the Act, nor was there any proof that petitioner was participating in a conspiracy or knew of it.

The Governmental agency charged with interpretation of the Act set certain limits which petitioner complied with; also, it approved of petitioner's conduct of business in 1936 with Dr. Tate. It now contends that its interpretation in 1936 was erroneous and therefore petitioner, by following such advice, became a co-conspirator.

ARGUMENT.

One who complies with the provisions of the Narcotic Act as to sales on official order forms, as well as follows the interpretation by the Narcotic Bureau, cannot be held a co-conspirator upon proof of quantity and frequency of sales. Such proof does not constitute knowledge of conspiracy.

It is conceded by petitioner at the outset that one who knows of the existence of a criminal conspiracy and knowingly aids the same is guilty of conspiracy.

Neither the evidence nor the opinions of the Circuit Court of Appeals and the Trial Court warrants the conclusion that petitioner knew of the existence of a conspiracy between Dr. Tate and Messrs. Foster, Johnson, Black and others.

Petitioner complied with the provisions of the Narcotic Act, in filling orders from Dr. Tate, only upon properly executed official order forms, supplied to Dr. Tate by the United States Collector for the District of South Carolina.

The Circuit Court held that petitioner had knowledge of a conspiracy between Dr. Tate and others and participated therein, and based its opinion on the following:

a. Frequency and amount of sales particularly between 1937 and 1940.

b. Petitioner's uniform practice to insert in catalog a separate sheet of paper, sometimes pink, sometimes blue, on which was listed morphine sulphate.

c. That petitioner had agreed with federal officers not to fill any one order form in excess of 1,000 one-half grain tablets, that upon receipt of an order in excess of such amount from Dr. Tate, it filled same up to 1,000 and asked him to make out a new form for the excess.

Considering the above in their inverse order, an examination of Government's Exhibit 4, will reveal that petitioner sent a letter to Dr. Tate informing him of the rule made by the Narcotic Bureau limiting sales to 1,000 tablets on any one order. It also suggested to Dr. Tate "to re-order this on a new narcotic order blank when your present supply is nearly exhausted." It is inconceivable that the Circuit Court could have drawn such an erroneous deduction from the record, if it had read the same. Such a suggestion on the part of the petitioner was not a violation of the spirit of the agreement, as contended by the Circuit Court.

The error of the Circuit Court as to the pink and blue slip in the catalog arises from its adoption, verbatim, of the Trial Judge's opinion in denying the motion to set aside the verdict. Dr. Tate, on such subject, was shown a catalog and asked if it was made up like most of them and had a pink slip in them, entitled "Narcotic Preparations". He stated the catalog was similar but he couldn't recall the pink slip so much (R. 92); the president of petitioner said the narcotic preparations were separated from the catalog in late 1940 (R. 201).

This is the only evidence on the subject of a separate listing of narcotics and it occurred subsequent to the period covered by the conspiracy. Thus, there was no uniform practice of stimulating sales by means of a separate pink or blue slip and both Courts were in error on this phase in the case.

There remains but the frequency and amount of sales factor, which is totally insufficient to make one a co-conspirator with another or justify the inference of knowledge of a conspiracy on the part of petitioner.

The statute is silent as to a ceiling on amounts to be honored in any orders received by a manufacturer or wholesaler. In this case, the Commissioner of Narcotics placed a maximum on any one order blank, namely 1,000 half grain tablets (Defendant's Exs. 14 and 20); the petitioner never violated this order. The opinion in *United States* v. *Fleming and Son*, 251 Fed. 932, is applicable here. At page 935, Justice Thompson said:

> "These are the sole conditions which Congress has prescribed as governing the sale and distribution of narcotics by the registered dealers. It appears Congress undertook to regulate the amount of such sales by putting the limitations on the physician who prescribes the drug, and not on the druggist who fills it. • • • Wisely, or unwisely, Congress appears to have placed

no other limitation whatever on the amount of the sale. It made the prescription of the registered physician the sole and sufficient warrant for the sale by the druggist of the drugs therein prescribed. Evidently it was intended that, if the druggist keeps within the limitations of the prescription, he is protected thereby. In an act prescribing severe penalties for its violation, courts dare not become wiser than the lawmakers and attempt to read into the act something which the lawmakers have omitted. * * *".

The Government, in *Eckert* v. *United States*, 7 F. (2d) 257, endeavored to sustain a conviction for the unlawful sale by a druggist of narcotics by showing that in six months he filled prescriptions totalling 228 ounces or 99,750 grains of morphine and 32,802 grains of cocaine. The druggist knew that most, if not all, of those to whom the prescriptions were issued, were addicts. The opinion of the Circuit Court seems more applicable to the facts of our present case than to the facts of that case itself. At page 258, it was said:

"We think the theory on which the case was tried and submitted to the jury is untenable, because not within the definition of any of the crimes denounced by the act. It does not place on the druggist the burden of inquiry into the intent and purpose of the physician in issuing the prescriptions; to the contrary, it expressly authorizes the druggist to sell on prescriptions issued by registered physicians. * * *".

"Responsibility for issuance of prescriptions is placed upon the physician, not the druggist; when brought to him to be filled it is his protection. * * *".

In reversing the conviction, the Court said at page 259:

"The amount that may be sold by a registered druggist on prescriptions not having been limited by the act, and there being no standard set up beyond which the druggist might not go in dispensing the drug within a given time, it seems to follow that the verdict of the

> jury was based upon its conclusion that the defendant was filling too many prescriptions and selling in the aggregate too much narcotic drugs to have been within the law when he made the sales charged against him, because in their judgment he exceeded a reasonable limit. * * *".

Petitioner does not assert that inasmuch as Dr. Tate was registered under the Narcotic Act, that therefore it could not conspire under any circumstances. The Government urged such proposition upon the Circuit Court and cited *Webb* v. *United States*, 249 U. S. 96; *Friedman* v. *United States*, 260 Fed. 388, cert. denied 250 U. S. 671, and *Heller* v. *United States*, 104 F. (2d) 446. These cases are of no assistance to the Government and an examination of the Friedman case will reveal that Dr. Friedman issued prescriptions with fictitious names on the same with Thompson's knowledge of such fact and further that Dr. Friedman arranged with druggist Thompson to fill such type of prescriptions. There was no such relationship between petitioner and Dr. Tate. Further, in such case the narcotics were purchased from Van Vleet-Mansfield Drug Company and Hessig-Ellis Drug Company of Memphis, Tennessee, which was the very city where Friedman and Thompson were situated. It is significant that in such case the Government asserted no contention of complicity in a conspiracy by either of the wholesale druggists. Also, *Saunders et al.* v. *United States*, 260 Fed. 386, presents a situation identical with that of the Friedman case, and again the Government made no assertion of any conspiratorial criminality on the part of the wholesale distributors.

Heller v. *United States* is entirely inapplicable as may be noted from the Circuit Court's opinion at page 447:

> "that Kuhn filled the prescription with knowledge of their fraudulent character; that this was done pur-

> suant to an understanding existing between him and Dr. Heller. Especially significant, as bearing upon this understanding, is evidence to the effect that certain prescriptions given by Heller were left undated by him so that they might be dated by Kuhn in such way as to present a record that would not excite the suspicion of the narcotic inspectors".

Our record is free from any evidence of any conversation between Dr. Tate and petitioner or any act on the part of either as to the official order forms from which the slightest imputation might be drawn of an understanding to ignore or circumvent the provisions of the Narcotic Act. In fact, the Heller case, when applied to our present situation, would support petitioner's claim of its utter lack of any knowledge on its part, not only as to the disposition by Dr. Tate but of any existent conspiracy between Dr. Tate and others.

Petitioner's knowledge of a conspiracy could not be based upon the fact that the bulk of the orders from Dr. Tate were for one-half grain sizes, inasmuch as the Commissioner of Narcotics and Agent Bransky approved filling of orders for such sizes providing the limit to physicians did not exceed 1,000 (R. p. 152, Defendant's Exs. 14 and 20). The Commissioner and his assistants are charged, by the Act itself, with its interpretation, and it cannot be heard to cry conspiracy, when its instructions on the interpetation of the Act have been followed by those complying with its provisions.

The Government argues that the orders were uniformly in the amount of 1,000 tablets and that the amount sold was so great that petitioner was bound to know that Dr. Tate could not dispense such amounts in the legitimate practice of his profession. This argument is without merit inasmuch as the Commissioner of Narcotics (Ex. 20) prescribed

the amount which petitioner could dispense on any one order and Agent Bransky (Ex. 14) prepared a schedule which he delivered to petitioner setting forth that 1,000 half grain tablets could be dispensed to a doctor on any one order. Also, Agent Bransky saw Dr. Tate's orders in petitioner's file between January and June 1936, nine in number for 6,700 half grains of morphine sulphate, and made no objection or suggestion as to the same.

Agent Bransky was at petitioner's place of business in 1936 for a purpose; his delegated duties included interpreting the provisions of the Act; his acquiescence in the state of petitioner's past records plus his written schedule as to future amounts of sale must be construed as a legal interpretation of the provisions of the Act. Having so construed its provisions, the United States cannot now be heard to complain that the Commissioner of Narcotics and Agent Bransky were in error and that petitioner's guilt can be predicated upon compliance with their interpretation.

There was no evidence of the commission of any unlawful act by petitioner. Nor was there any evidence of its knowledge of a conspiracy. Under such circumstances, the Circuit Court's opinion in this case seems to be in direct contravention to its opinion in *Di Bonaventura* v. *United States*, 15 F. (2d) 494, wherein the court said at page 496:

> "This might have justified a conviction of maintaining a nuisance or of unlawful manufacture, but not a conviction of the felony of conspiracy, in the absence of any finding that the landlord entered into a combination or agreement to violate the law, or that he, with knowledge that a conspiracy existed, not merely that the law was being violated, aided the conspirators in carrying out their unlawful design. * * *".

Subsequent to such decision, the same Fourth Circuit in *Backun* v. *United States*, 112 F. (2d) 635, had before it the question of whether one who sells property to another knowing that the buyer intends to use it for the commission of a felony renders himself criminally liable as aiding and abetting in its commission. At such time the Second Circuit had reversed the conviction in *Falcone* v. *United States*, 109 F. (2d) 579, wherein the court said at page 581:

> "There are indeed instances of criminal liability of the same kind, where the law imposes punishment merely because the accused did not forbear to do that from which the wrong was likely to follow; but in prosecutions for conspiracy or abetting, his attitude towards the forbidden undertaking must be more positive. It is not enough that he does not forego a normally lawful activity, of the fruits of which he knows that others will make an unlawful use; he must in some sense promote their venture himself, make it his own, have a stake in its outcome. * * *".

The Court in the Backun case refused to follow the reasoning of the Circuit Court in the Falcone case relative to the ground that a co-conspirator must have a stake in the outcome of a conspiracy. The Court therein said at page 637:

> "Guilt as an accessory depends, not on 'having a stake' in the outcome of crime, as suggested in the Falcone case, supra, but on aiding and assisting the perpetrators; and those who make a profit by furnishing to criminals, whether by sale or otherwise, the means to carry on their nefarious undertakings aid them just as truly as if they were actual partners with them, having a stake in the fruits of their enterprise. To say that the sale of goods is a normally lawful transaction is beside the point. * * *".

However, the Supreme Court in affirming *United States* v. *Falcone*, 311 U. S. 205, said at page 208:

> "The argument, the merits of which we do not consider, overlooks the fact that the opinion below proceeded on the assumption that the evidence showed only that respondents or some of them knew that the materials sold would be used in the distillation of illicit spirits, and fell short of showing respondents' participation in the conspiracy or that they knew of it. We did not bring the case here to review the evidence, but we are satisfied that the evidence on which the Government relies does not do more than show knowledge by respondents that the materials would be used for illicit distilling if it does as much in the case of some. * * *".

This Court also said at page 210:

> "The evidence respecting the volume of sales to any known to be distillers is too vague and inconclusive to support a jury finding that respondents knew of a conspiracy from the size of the purchases even though we were to assume what we do not decide that the knowledge would make them conspirators or aiders or abbettors of the conspiracy. Respondents are not charged with aiding and abetting illicit distilling, and they cannot be brought within the sweep of the Government's conspiracy dragnet if they had no knowledge that there was a conspiracy. * * *".

From the affirmance of *United States* v. *Falcone*, it seems logical that this Court by its approval of the Second Circuit's reversal, has overruled the reasoning in *Bachun* v. *United States*.

In the *Falcone* case, the Circuit Court assumed that at least some of the respondents knew that the sugar and cans would be used in the manufacture of illicit spirits. Such

evidence was held insufficient to show that the respondents knew of the existence of the conspiracy proven. That assumption is far more substantial than the evidence in our present case. Here there was no personal contact of any kind between Dr. Tate and petitioner; there was no concealment of the means of compliance with the provisions of the Narcotic Act; the petitioner never met Messrs. Foster, Reei or Block or even knew that they were connected with Dr. Tate. In fact, it did not possess the knowledge which both upper Courts assumed in their opinions in the *Falcone* case.

The evidence did not warrant submission of the charge of conspiracy to the jury. The reason assigned by the Trial Judge for submission was the novelty of the question involved, as appears from the Court's remarks (R. 224):

> "* * * I must confess, however, that it is a mighty close question, and if it were not a novel question I might be inclined to grant your motion, but it being a novel question and a new question, I think a District Judge should let the Circuit Court of Appeals pass on it. Of course, if I should direct a verdict, that would not end it and the question would not be settled. I think it is a question that ought to be settled by the Circuit Court of Appeals. I think the District Attorney should have indicted this defendant for a substantive offence instead of conspiracy. The Courts are frowning down on cases of conspiracy which use a drag-net to bring in the evidence. I must say that I have considerable doubt that I should not direct a verdict in that the Circuit Court of Appeals should pass upon it, since it is such an important question. I have given it considerable thought and study. I went home last night and thought about it from different angles, and it seems to me that there is probably enough testimony to submit to the jury on the question of whether or not it constitutes a conspiracy. Of course, I will hear you, Mr. Mahoney, if you care to argue."

II.

The Court's charge to the jury was improper as well as confusing and misleading.

The Court, in its charge, said that the jury had to convict both defendants, they could not convict one; that they must convict two or none (R. 228, 232).

At this stage of the trial, Black and Johnsen had plead guilty; the trial was severed as to Foster and there remained but petitioner and Dr. Tate on trial. Jurors, both concededly and rightfully, have a tremendous respect for the directions given by the Trial Judge as to the law applicable to a case. This case was no exception. Having but two defendants before it in the courtroom, and hearing the Court admonish them that they had to convict two, it was logical that jurors were impressed with those words and came to the conclusion that the two that must be convicted were the two on trial, one of which was the petitioner.

It is true that the Court, at petitioner's counsel's request, stated that they could find Dr. Tate "guilty" and the petitioner "not guilty" but added to such charge that they could find Dr. Tate and the other defendants guilty (R. 237-238).

This did not tend to clarify the situation inasmuch as there were no other defendants on trial to be found guilty by the jury at that time.

A clear, well-defined charge was required because of the doubt expressed by the Trial Judge as to the sufficiency of the evidence to take the case to the jury. The actual charge befogged rather than clarified and left but one avenue for the jurors to follow, namely to convict both defendants who were on trial.

This constituted definite prejudicial error.

Conclusion.

For the reasons stated, it is respectfully urged that the prayer of the petition should be granted and that the decision of the Circuit Court of Appeals for the Fourth Circuit, referred to, should be reversed by this Court, under writ of certiorari.

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CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1942

No. 593

DIRECT SALES COMPANY, INC.,
Petitioner,

vs.

THE UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

Brief for Appellant, Direct Sales Company, Inc.

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Brief for Appellant, Direct Sales Company, Inc.

Opinion Below.

The opinion of the Circuit Court of Appeals is reported in 131 F. (2d) 835.

Jurisdiction.

The judgment of the Circuit Court of Appeals affirming the conviction of petitioner was entered November 13, 1942 (R. 269). The jurisdiction of this Court is conferred by Section 240 (a) of the Judicial Code, as amended by

the Act of February 13, 1925; as well as Rule XI of the Criminal Appeals Rules, promulgated by this Court on May 7, 1934.

This Court on March 1, 1943 granted petition for certiorari (R. 270).

Questions Presented.

1. Whether there was sufficient evidence to sustain petitioner's conviction of conspiracy to violate the Harrison Narcotic Act.

2. Whether sales of morphine sulphate tablets by petitioner, a New York manufacturer and wholesaler of drugs, to a South Carolina physician, both licensed by Government, pursuant to Act, in substantial amounts at frequent intervals, is sufficient to show "knowledge" of a conspiracy on the part of petitioner.

3. Whether petitioner was not entitled to a directed verdict of not guilty, because there was no evideence to show that it performed any act with knowledge of any conspiracy between Dr. Tate and others.

4. Whether petitioner was not entitled to a directed verdict of not guilty because its manner of sales, both as to quantity and frequency, were pursuant to written instructions of Commissioner of Narcotics and his agents.

Statutes Involved.

Section 37 of the Criminal Code (U. S. C., Title 18, Sec. 88), so far as pertinent, provides

> "If two or more persons conspire * * * to commit any offense against the United States * * * and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000.00, or imprisoned not more than two years, or both."

Section 332 of the Criminal Code (U. S. C., Title 18, Sec. 550) provides

> "Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal."

Article III of Joint Narcotic Regulations made by Commissioner of Internal Revenue with approval of Secretary of Treasury, effective January 1, 1928, provides

> "Correspondence: Correspondence relative to interpretation of the law and these regulations may be addressed to the Commissioner of Prohibition, Washington, D. C. Inquiries relative to registration and requests for blank forms should be addressed to the various collectors of internal revenue. * * *."

Statement.

In May 1940, the petitioner, Dr. John V. Tate, and three others were indicted in the Western District of South Carolina (R. 1). The indictment charged, in a single count, a conspiracy to defraud the United States of its revenues by violating the provisions of the Harrison Narcotic Act. The substance of the indictment was that the petitioner and Dr. John V. Tate, through the use of official order forms, would secure large quantities of morphine sulphate for purposes other than in the conduct of a lawful business in said drugs or in the legitimate practice of medicine, during a period from 1933 to June 1940 (R. 2). Two of

the defendants pleaded guilty and a severance was granted as to a third defendant (R. 145). Dr. John V. Tate pleaded not guilty but appeared as a witness on behalf of the Government (R. 84). The case was submitted to the jury as to petitioner and Dr. John V. Tate, and both were convicted (R. 239); the petitioner was sentenced to pay a fine of $1,000.00 and no disposition was made as to Dr. Tate's matter (R. 253).

On appeal by the petitioner only, the Circuit Court of Appeals for the Fourth Circuit affirmed the conviction (R. 269); the Circuit Court held that the evidence was sufficient to support the verdict of the jury and that it, petitioner, must have known, because of the quantity sold, that Dr. Tate was disposing of the morphine sulphate in violation of the law.

The petitioner's guilt was based upon the following evidence:

Petitioner is a New York corporation, engaged in the mail order business of a manufacturer and wholesale dealer in narcotics and registered under the provisions of the Harrison Narcotic Act (R. 1). Dr. John V. Tate is a physician practicing in Calhoun Falls, South Carolina and duly registered under the provisions of the Harrison Narcotic Act (R. 2). The other three defendants were residents of Georgia and South Carolina and were not registered under the provisions of said Act (R. 2).

The petitioner sells directly to the customer, the majority of whom are on a mailing list of physicians throughout the United States, in the number of 14,400 (R. 139); it has no traveling representatives but solicited business by means

of catalogs and circulars (R. 92). The catalogs were of pamphlet size, containing a list of pharmaceutical supplies and narcotics with the order number and price per article or lot sale of same.

During the time of the indictment, the catalog did not contain a separate sheet of paper, in pink or blue color, listing narcotics (R. 92), as set forth in opinion of Trial Judge (R. 243) and opinion of Circuit Court (R. 267-268).

Dr. Tate, a physician at Calhoun Falls, South Carolina, who was registered with the Collector of Internal Revenue under the Harrison Narcotic Act (R. 1), purchased by means of official order forms various amounts of morphine sulphate from petitioner. These forms were required to be executed by physicians in duplicate, the original forwarded to wholesaler and the duplicate kept by physician for a period of two years (R. 85-86, Govt. Ex. 2). Dr. Tate's last purchase from petitioner was May 24, 1940 (R. 99, Defendant's Exhibit 1).

Various purchases of morphine sulphate were made by Agent Rogers, informer LaMarr and the defendant George C. Johnson from Dr. Tate (R. 42, 49, 59). Dr. Tate never conversed with anyone connected with petitioner and it had no information as to sales being made by Dr. Tate (R. 108-109).

In August-September, 1936, narcotic agent Bransky conducted an inspection of petitioner's manufacturing establishment at the direction of the Commissioner of Narcotics (R. 119). He furnished petitioner with a list of names of doctors who had been convicted as violators of the Narcotic Law (R. 121, Govt. Ex. 6). He requested that the lists

in the catalogs be reduced from 5,000 to 1,000 and petitioner complied with this request and reprinted its catalog (R. 124, 130). Agent Bransky examined all narcotic orders received by petitioner between January 1, 1936 and June 30, 1936 (R. 132), and these included nine official order forms aggregating 6,700 half grain morphine tablets (R. 135-136, Defendant's Exhibit 4). He also directed petitioner's employees to submit all order forms for narcotics to him; among these were two from Dr. Tate within seventeen days for 1,400 half grain morphine sulphate tablets; he made no objection to these orders (R. 136-137-138, Defendant's Exhibit 5). After delivery of letter of August 12, 1936 to petitioner (Govt's Ex. 6), Bransky repeatedly removed the names of doctors from such alleged list as well as from other black lists delivered to petitioner (R. 141, Defendant's Exs. 6, 7, 8, 9, 11, 12, 13); this removal was pursuant to instructions from Commissioner of Narcotics (R. 143).

Bransky, in 1936, while at the office of petitioner, prepared an approved schedule setting forth the quantities of morphine sulphate tablets which could be dispensed to doctors, druggists and hospitals on any one order (R. 151-152, Defendant's Exhibit 14). This schedule set the number to be sold to a doctor on any one order at 1,000 tablets and in reply to Court's inquiry "That was 1,000 tablets for what period?", he answered, "There wasn't any period set" (R. 152).

Commissioner of Narcotics Anslinger sent a letter to petitioner dated October 20, 1936, wherein he stated "It is also suggested that no physician or other practitioner be supplied in excess of 1,000 one-half grain tablets or their equivalent in tablets of other size, or one ounce of cube

morphine on any one order * * *" (R. 159, Defendant's Ex. 20).

Dr. Tate's name did not appear on any list sent by Commissioner of Narcotics to petitioner (R. 155-156, Defendant's Exs. 6, 7, 8, 9, 10, 11, 12, 13, 15, 17 and 18); in fact, the District Attorney conceded that Dr. Tate's name was not on any of the lists (R. 156).

Ruth Gertz, office manager of petitioner, produced evidence that petitioner submitted monthly reports to Collector of Internal Revenue; that these reports set forth the amount of each sale during the period covered in the indictment (R. 187); that there are 14,400 doctors' names in the files of petitioner and after receipt of Government's Ex. 5, petitioner marked every card which compared with the names on said exhibit "No Narcotics" (R. 188). Since 1937, petitioner, at request of district inspector, made out a daily list of all sales of narcotics made to doctors of 500 grains or more; these were sent in weekly (R. 189).

George Dotterweich, president of petitioner, had a conversation with Agent Bransky wherein the latter placed a limitation of 1,000 tablets of morphine sulphate to a doctor on any one order and then gave to him Defendant's Exhibit 14 (R. 199). The Narcotic Bureau corresponded with petitioner in late 1940 and suggested that petitioner offer no discount. This request was complied with and petitioner took the narcotics out of the general listing and listed them on a separate sheet (R. 201). He also stated that a doctor could use such tablets hypodermically, orally or as medicating tablets and that 48 one-half grain tablets would be used in making one gallon of cough syrup (R. 216-218).

The Circuit Court of Appeals held that the evidence was sufficient to submit to the jury and also to support the verdict of guilt. The decision was supported on one ground that petitioner repeatedly and regularly solicited Dr. Tate's orders by means of a pink or blue slip, which is concluded was a means of stimulating narcotics sales only. The Court was in error because such slip was not inserted until after the end of the period covered by the indictment (R. 201). The Court also held that because of the fact that Calhoun Falls, South Carolina was a small town and the sales by petitioner to Dr. Tate were frequent and substantial in quantity, it therefore knew that Dr. Tate was disposing of the drug in violation of the law and by continuing shipments, it became a co-conspirator with him (R. 268). The Court also stated "When Dr. Tate sent in one order for more than the agreed quantity, appellant shipped this maximum quantity and merely asked Dr. Tate to make out a new form for the excess. This was a clear violation of the spirit of the agreement" (R. 269). An examination of Government's Exhibit 4 (letter from petitioner to Dr. Tate as to such order) shows that Dr. Tate was directed "to re-order this on a New Narcotic Order blank when your present supply is nearly exhausted."

Specifications of Errors to be Urged.

The Circuit Court of Appeals erred:

1. In sustaining the action of the District Court in denying defendant's motion for a directed verdict of not guilty, both at the close of the Government's case and again at the close of the entire case.

2. In refusing to rule that the District Court should have granted petitioner's motion to set aside verdict and for a new trial.

3. In holding that the decision of *United States* v. *Falcone*, 311 U. S. 205, is inapplicable to the case at bar.

4. In holding that the evidence was sufficient to support the verdict of the jury.

5. In holding that petitioner violated its agreement with Narcotic Commissioner, when upon receipt of an order from Dr. Tate for more than the agreed quantity, it shipped the maximum specified and asked Dr. Tate to make out a new form for the excess. A reading of Government's Exhibit 4 will confirm this error.

6. The Court erred in its charge to the jury that they had to convict both defendants, they could not convict one.

7. In holding that petitioner solicited business of Dr. Tate throughout period of indictment by means of a separate pink or blue slip, which contained only narcotic preparations, the purpose of which was to stimulate sales of narcotics.

Summary.

The Court below came to the conclusion that because Dr. Tate was a practitioner in a small town and the sales by petitioner were not within a reasonable limit, that therefore it must have known that Dr. Tate was disposing of such morphine sulphate in violation of the Act.

The Circuit Court, in adopting, verbatim, the phraseology of the Trial Judge in his decision in denying the motion to set aside the verdict, committed the same error as the Trial Judge and such adoptions would indicate an

unfamiliarity on the part of the Circuit Court as to the actual facts of the case (R. 243-267).

No limit has been placed by Congress upon sales by manufacturers to register physicians and it seems illogical, as well as illegal, that the Courts would allow a jury to read into an Act what is or is not reasonable.

The direct evidence is to the effect that petitioner had no knowledge of Dr. Tate's disposition of the drug delivered to him (R. 109). Mere quantity and frequency of sales would not overcome such direct evidence and prove knowledge of a conspiracy, beyond a reasonable doubt on the part of petitioner.

There is not an iota of proof that petitioner knew of any sale by Tate to another. The elements of intent, namely, "promoting the venture, making it his own, having a stake in its outcome," are lacking in this case.

There was no proof that petitioner knew that Dr. Tate was selling to anyone not registered under the Act, nor was there any proof that petitioner was participating in a conspiracy or knew of it.

The Governmental agency charged with interpretation of the Act set certain limits which petitioner complied with; also, it approved of petitioner's conduct of business in 1936 with Dr. Tate. It now contends that its interpretation in 1936 was erroneous and therefore petitioner, by following such advice, became a co-conspirator.

ARGUMENT.

One who complies with the provisions of the Narcotic Act as to sales on official order forms, as well as follows the interpretation by the Narcotic Bureau, cannot be held a co-conspirator upon proof of quantity and frequency of sales. Such proof does not constitute knowledge of conspiracy.

It is conceded by petitioner at the outset that one who knows of the existence of a criminal conspiracy and knowingly aids the same is guilty of conspiracy.

Neither the evidence nor the opinions of the Circuit Court of Appeals and the Trial Court warrants the conclusion that petitioner knew of the existence of a conspiracy between Dr. Tate and Messrs. Foster, Johnson, Black and others.

Petitioner complied with the provisions of the Narcotic Act, in filling orders from Dr. Tate, only upon properly executed official order forms, supplied to Dr. Tate by the United States Collector for the District of South Carolina.

The Circuit Court held that petitioner had knowledge of a conspiracy between Dr. Tate and others and participated therein, and based its opinion on the following:

a. Frequency and amount of sales particularly between 1937 and 1940.

b. Petitioner's uniform practice to insert in catalog a separate sheet of paper, sometimes pink, sometimes blue, on which was listed morphine sulphate.

c. That petitioner had agreed with federal officers not to fill any one order form in excess of 1,000 one-half grain tablets, that upon receipt of an order in excess of such amount from Dr. Tate, it filled same up to 1,000 and asked him to make out a new form for the excess.

Considering the above in their inverse order, an examination of Government's Exhibit 4, will reveal that petitioner sent a letter to Dr. Tate informing him of the rule made by the Narcotic Bur[illegible] limiting sales to 1,000 tablets on any one order. It also suggested to Dr. Tate "to re-order this on a new narcotic order blank when your present supply is nearly exhausted." It is inconceivable that the Circuit Court could have drawn such an erroneous deduction from the record, if it had read the same. Such a suggestion on the part of the petitioner was not a violation of the spirit of the agreement, as contended by the Circuit Court.

The error of the Circuit Court as to the pink and blue slip in the catalog arises from its adoption, verbatim, of the Trial Judge's opinion [illegible] denying the motion to set aside the verdict. Dr. Tate, on such subject, was shown a catalog and asked if it was made up like most of them and had a pink slip in them, entitled "Narcotic Preparations". He stated the catalog was similar but he couldn't recall the pink slip so much (R. 92); the president of petitioner said the narcotic preparations were separated from the catalog in late 1940 (R. 201).

This is the only evidence on the subject of a separate listing of narcotics and it occurred subsequent to the period covered by the conspiracy. Thus, there was no uniform practice of stimulating sales by means of a separate pink or blue slip and both Courts were in error on this phase in the case.

There remains but the frequency and amount of sales factor, which is totally insufficient to make one a co-conspirator with another or justify the inference of knowledge of a conspiracy on the part of petitioner.

The statute is silent as to a ceiling on amounts to be honored in any orders received by a manufacturer or wholesaler. In this case, the Commissioner of Narcotics placed a maximum on any one order blank, namely 1,000 half grain tablets (Defendant's Exs. 14 and 20); the petitioner never violated this order. The opinion in *United States* v. *Fleming and Son*, 251 Fed. 932, is applicable here. At page 935, Justice Thompson said:

> "These are the sole conditions which Congress has prescribed as governing the sale and distribution of narcotics by the registered dealers. It appears Congress undertook to regulate the amount of such sales by putting the limitations on the physician who prescribes the drug, and not on the druggist who fills it. * * * Wisely, or unwisely, Congress appears to have placed no other limitation whatever on the amount of the sale. It made the prescription of the registered physician the sole and sufficient warrant for the sale by the druggist of the drugs therein prescribed. Evidently it was intended that, if the druggist keeps within the limitations of the prescription, he is protected thereby. In an act prescribing severe penalties for its violation, courts dare not become wiser than the lawmakers and attempt to read into the act something which the lawmakers have omitted. * * *".

The Government, in *Echert* v. *United States*, 7 F. (2d) 257, endeavored to sustain a conviction for the unlawful sale by a druggist of narcotics by showing that in six months he filled prescriptions totalling 228 ounces or 99,750 grains of morphine and 32,802 grains of cocaine. The druggist knew that most, if not all, of those to whom the prescriptions were issued, were addicts. The opinion of the Circuit Court seems more applicable to the facts of our present case than to the facts of that case itself. At page 258, it was said:

> "We think the theory on which the case was tried and submitted to the jury is untenable, because not

within the definition of any of the crimes denounced by the act. It does not place on the druggist the burden of inquiry into the intent and purpose of the physician in issuing the prescriptions; to the contrary, it expressly authorizes the druggist to sell on prescriptions issued by registered physicians. * * *".

"Responsibility for issuance of prescriptions is placed upon the physician, not the druggist; when brought to him to be filled it is his protection. * * *".

In reversing the conviction, the Court said at page 259:

"The amount that may be sold by a registered druggist on prescriptions not having been limited by the act, and there being no standard set up beyond which the druggist might not go in dispensing the drug within a given time, it seems to follow that the verdict of the jury was based upon its conclusion that the defendant was filling too many prescriptions and selling in the aggregate too much narcotic drugs to have been within the law when he made the sales charged against him, because in their judgment he exceeded a reasonable limit. * * *".

Petitioner does not assert that inasmuch as Dr. Tate was registered under the Narcotic Act, that therefore it could not conspire under any circumstances. The Government urged such proposition upon the Circuit Court and cited *Webb* v. *United States*, 249 U. S. 96; *Friedman* v. *United States*, 260 Fed. 388, cert. denied 250 U. S. 671, and *Heller* v. *United States*, 104 F. (2d) 446. These cases are of no assistance to the Government and an examination of the Friedman case will reveal that Dr. Friedman issued prescriptions with fictitious names on the same with Thompson's knowledge of such fact and further that Dr. Friedman arranged with druggist Thompson to fill such type of prescriptions. There was no such relationship between petitioner and Dr. Tate. Further, in such case the narcotics were purchased from Van Vleet-Mansfield Drug Company and Hessig-Ellis Drug Company of Memphis,

Tennessee, which was the very city where Friedman and Thompson were situated. It is significant that in such case the Government asserted no contention of complicity in a conspiracy by either of the wholesale druggists. Also, *Saunders et al.* v. *United States*, 260 Fed. 386, presents a situation identical with that of the Friedman case, and again the Government made no assertion of any conspiratorial criminality on the part of the wholesale distributors.

Heller v. *United States* is entirely inapplicable as may be noted from the Circuit Court's opinion at page 447:

> "that Kuhn filled the prescription with knowledge of their fraudulent character; that this was done pursuant to an understanding existing between him and Dr. Heller. Especially significant, as bearing upon this understanding, is evidence to the effect that certain prescriptions given by Heller were left undated by him so that they might be dated by Kuhn in such way as to present a record that would not excite the suspicion of the narcotic inspectors".

Our record is free from any evidence of any conversation between Dr. Tate and petitioner or any act on the part of either as to the official order forms from which the slightest imputation might be drawn of an understanding to ignore or circumvent the provisions of the Narcotic Act. In fact, the Heller case, when applied to our present situation, would support petitioner's claim of its utter lack of any knowledge on its part, not only as to the disposition by Dr. Tate but of any existent conspiracy between Dr. Tate and others.

Petitioner's knowledge of a conspiracy could not be based upon the fact that the bulk of the orders from Dr. Tate were for one-half grain sizes, inasmuch as the Com-

missioner of Narcotics and Agent Bransky approved filling of orders for such sizes providing the limit to physicians did not exceed 1,000 (R. p. 152, Defendant's Exs. 14 and 20). The Commissioner and his assistants are charged, by the Act itself, with its interpretation, and it cannot be heard to cry conspiracy, when its instructions on the interpretation of the Act have been followed by those complying with its provisions.

The Government argues that the orders were uniformly in the amount of 1,000 tablets and that the amount sold was so great that petitioner was bound to know that Dr. Tate could not dispense such amounts in the legitimate practice of his profession. This argument is without merit inasmuch as the Commissioner of Narcotics (Ex. 20) prescribed the amount which petitioner could dispense on any one order and Agent Bransky (Ex. 14) prepared a schedule which he delivered to petitioner setting forth that 1,000 half grain tablets could be dispensed to a doctor on any one order. Also, Agent Brasky saw Dr. Tate's orders in petitioner's file between January and June 1936, nine in number for 6,700 half grains of morphine sulphate, and made no objection or suggestion as to the same.

Agent Bransky was at petitioner's place of business in 1936 for a purpose; his delegated duties included interpreting the provisions of the Act; his acquiescence in the state of petitioner's past records plus his written schedule as to future amounts of sale must be construed as a legal interpretation of the provisions of the Act. Having so construed its provisions, the United States cannot now be heard to complain that the Commissioner of Narcotics and Agent Bransky were in error and that petitioner's guilt can be predicated upon compliance with their interpretation.

There was no evidence of the commission of any unlawful act by petitioner. Nor was there any evidence of its knowledge of a conspiracy. Under such circumstances, the Circuit Court's opinion in this case seems to be in direct contravention to its opinion in *Di Bonaventura* v. *United States*, 15 F. (2d) 494, wherein the court said at page 496:

> "This might have justified a conviction of maintaining a nuisance or of unlawful manufacture, but not a conviction of the felony of conspiracy, in the absence of any finding that the landlord entered into a combination or agreement to violate the law, or that he, with knowledge that a conspiracy existed, not merely that the law was being violated, aided the conspirators in carrying out their unlawful design. * * *".

Subsequent to such decision, the same Fourth Circuit in *Backun* v. *United States*, 112 F. (2d) 635, had before it the question of whether one who sells property to another knowing that the buyer intends to use it for the commission of a felony renders himself criminally liable as aiding and abetting in its commission. At such time the Second Circuit had reversed the conviction in *Falcone* v. *United States*, 109 F. (2d) 579, wherein the court said at page 581:

> "There are indeed instances of criminal liability of the same kind, where the law imposes punishment merely because the accused did not forbear to do that from which the wrong was likely to follow; but in prosecutions for conspiracy or abetting, his attitude towards the forbidden undertaking must be more positive. It is not enough that he does not forego a normally lawful activity, of the fruits of which he knows that others will make an unlawful use; he must in some sense promote their venture himself, make it his own, have a stake in its outcome. * * *".

The Court in the Backun case refused to follow the reasoning of the Circuit Court in the Falcone case relative to the ground that a co-conspirator must have a stake in the

outcome of a conspiracy. The Court therein said at page 637:

> "Guilt as an accessory depends, not on 'having a stake' in the outcome of crime, as suggested in the Falcone case, supra, but in aiding and assisting the perpetrators; and those who make a profit by furnishing to criminals, whether by sale or otherwise, the means to carry on their nefarious undertakings aid them just as truly as if they were actual partners with them, having a stake in the fruits of their enterprise. To say that the sale of goods is a normally lawful transaction is beside the point. * * *".

However, the Supreme Court in affirming *United States v. Falcone*, 311 U. S. 205, said at page 208:

> "The argument, the merits of which we do not consider, overlooks the fact that the opinion below proceeded on the assumption that the evidence showed only that respondents or some of them knew that the materials sold would be used in the distillation of illicit spirits, and fell short of showing respondents' participation in the conspiracy or that they knew of it. We did not bring the case here to review the evidence, but we are satisfied that the evidence on which the Government relies does not do more than show knowledge by respondents that the materials would be used for illicit distilling if it does as much in the case of some. * * *"

This Court also said at page 210:

> "The evidence respecting the volume of sales to any known to be distillers is too vague and inconclusive to support a jury finding that respondents knew of a conspiracy from the size of the purchases even though we were to assume what we do not decide that the knowledge would make them conspirators or aiders or abettors of the conspiracy. Respondents are not charged with aiding and abetting illicit distilling, and they cannot be brought within the sweep of the Government's conspiracy dragnet if they had no knowledge that there was a conspiracy. * * *."

From the affirmance of *United States* v. *Falcone*, it seems logical that this Court by its approval of the Second Circuit's reversal, has overruled the reasoning in *Bachun* v. *United States*.

In the *Falcone* case, the Circuit Court assumed that at least some of the respondents knew that the sugar and cans would be used in the manufacture of illicit spirits. Such evidence was held insufficient to show that the respondents knew of the existence of the conspiracy proven. That assumption is far more substantial than the evidence in our present case. Here there was no personal contact of any kind between Dr. Tate and petitioner; there was no concealment of the means of compliance with the provisions of the Narcotic Act; the petitioner never met Messrs. Foster, Reel or Block or even knew that they were connected with Dr. Tate. In fact, it did not possess the knowledge which both upper Courts assumed in their opinions in the *Falcone* case.

The evidence did not warrant submission of the charge of conspiracy to the jury. The reason assigned by the Trial Judge for submission was the novelty of the question involved, as appears from the Court's remarks (R. 224):

> "* * * I must confess, however, that it is a mighty close question, and if it were not a novel question I might be inclined to grant your motion, but it being a novel question and a new question, I think a District Judge should let the Circuit Court of Appeals pass on it. Of course, if I should direct a verdict, that would not end it and the question would not be settled. I think it is a question that ought to be settled by the Circuit Court of Appeals. I think the District Attorney should have indicted this defendant for a substantive offence instead of conspiracy. The Courts are frowning down on cases of conspiracy which use a drag-net to bring in the evidence. I must say that I have considerable doubt that I should not direct a verdict in that the Cir-

cuit Court of Appeals should pass upon it, since it is such an important question. I have given it considerable thought and study. I went home last night and thought about it from different angles, and it seems to me that there is probably enough testimony to submit to the jury on the question of whether or not it constitutes a conspiracy. Of course, I will hear you, Mr. Mahoney, if you care to argue."

II.

The Court's charge to the jury was improper as well as confusing and misleading.

The Court, in its charge, said that the jury had to convict both defendants, they could not convict one; that they must convict two or none (R. 228, 232).

At this state of the trial, Black and Johnson had plead guilty; the trial was severed as to Foster and there remained but petitioner and Dr. Tate on trial. Jurors, both concededly and rightfully, have a tremendous respect for the directions given by the Trial Judge as to the law applicable to a case. This case was no exception. Having but two defendants before it in the courtroom, and hearing the Court admonish them that they had to convict two, it was logical that jurors were impressed with those words and came to the conclusion that the two that must be convicted were the two on trial, one of which was the petitioner.

It is true that the Court, at petitioner's counsel's request, stated that they could find Dr. Tate "guilty" and the petitioner "not guilty" but added to such charge that they could find Dr. Tate and the other defendants guilty (R. 237-238).

This did not tend to clarify the situation inasmuch as there were no other defendants on trial to be found guilty by the jury at that time.

A clear, well-defined charge was required because of the doubt expressed by the Trial Judge as to the sufficiency of the evidence to take the case to the jury. The actual charge befogged rather than clarified and left but one avenue for the jurors to follow, namely to convict both defendants who were on trial.

This constituted definite prejudicial error.

Conclusion.

It is, therefore, respectfully submitted that the Government's theory, namely, that the appellant was filling too many orders for Dr. Tate and in amounts which they considered unreasonable was adopted by the jury, which returned the verdict of guilt. The Direct Sales Company, Inc., respectfully submits that such a theory is erroneous and requests this Court to reverse the judgments of the District Court and the Circuit Court of Appeals and to dismiss the indictment.

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FEB 19 1943

No. 593

In the Supreme Court of the United States

OCTOBER TERM, 1942

DIRECT SALES COMPANY, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the district court overruling petitioner's plea in abatement and demurrer to the indictment (R. 21–32) is reported at 40 F. Supp. 917, and its opinion overruling motions for a new trial and for arrest of judgment (R. 242–252) is reported at 44 F. Supp. 623. The opinion of the circuit court of appeals (R. 266–269) is reported at 131 F. (2d) 835.

JURISDICTION

The judgment of the circuit court of appeals was entered November 13, 1942 (R. 269–270).

The petition for a writ of certiorari was filed December 18, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rule XI of the Rules of Practice and Procedure in Criminal Cases, promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether there was sufficient evidence to warrant submission of the question of petitioner's guilt to the jury.

2. Whether the trial court's instructions erroneously gave the jury the impression that if they convicted one of the alleged conspirators they also had to convict petitioner.

STATUTE INVOLVED

Section 37 of the Criminal Code (18 U. S. C. 88) provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both.

STATEMENT

Petitioner, Dr. John V. Tate, George C. Johnson, Clyde A. Foster, and Reel B. Black were in-

dicted on May 26, 1941, in the District Court for the Western District of South Carolina in one count charging a conspiracy in violation of Section 37 of the Criminal Code (18 U. S. C. 88) (R. 1–10). The indictment alleged that from May 1, 1933, to June 10, 1940, at Calhoun Falls, South Carolina, the defendants conspired to defraud the United States of its revenues as provided by the Harrison Narcotic Act, as amended (I. R. C. § 3220), and to violate the provisions of that act interdicting the obtaining of drugs for unlawful purposes by means of official order forms, the trafficking in drugs without having registered and paid the taxes required by law, and the sale of drugs except in or from the original tax stamped packages and except in pursuance of official order forms (I. R. C. §§ 2553 (a), 2554 (a) and (g), 3224 (a)). It was further alleged that in accomplishing the purposes of the conspiracy petitioner, by means of circulars and catalogues, induced Dr. Tate to obtain from it by use of his official order forms large quantities of morphine sulphate at frequent intervals, knowing that the drugs were obtained by Dr. Tate for a purpose other than use and sale in the conduct of a lawful business in drugs or in the legitimate practice of his profession; that Dr. Tate sold the drugs in large quantities to the defendants Johnson, Foster, and Black, and other persons unknown to the grand jury, for the purposes of enabling such

persons to satisfy their addiction and to sell them to other persons; and that Johnson, Foster, and Black in turn sold the drugs to persons known and unknown to the grand jury (R. 2–3).

Petitioner filed a plea in abatement (R. 16–20) and a demurrer to the indictment (R. 20–21), which were overruled (R. 21–32). The defendants Johnson and Black pleaded guilty (R. 33). During the ensuing trial the defendant Foster suffered a heart attack and by consent of all counsel a mistrial was ordered as to him (R. 145, 242); the trial proceeded as to petitioner and Dr. Tate (*ibid.*). A motion for a directed verdict made at the close of the Government's case (R. 183) and renewed at the conclusion of all the evidence (see R. 223–224) was overruled (*ibid.*). Petitioner and Dr. Tate were found guilty (R. 10, 239) and petitioner's motions for a new trial (R. 240) and for arrest of judgment (R. 241) were denied (R. 242–252, 253). Petitioner was sentenced to pay a fine of $1,000 (R. 253, 254). On appeal by petitioner alone, its conviction was affirmed (R. 269–270).

The evidence pertaining to petitioner's part in the conspiracy shows as follows:

Petitioner is a New York corporation, having its principal place of business in Buffalo (R. 1, 33). It conducts a mail order drug business (R. 201) and is also a manufacturer and wholesale dealer in opium, its salts and derivatives (R. 1,

33). Pursuant to the provisions of the narcotic laws, petitioner has registered annually as a manufacturer and wholesaler of narcotic drugs (R. 1, 33, 201, 202). Petitioner does not solicit orders through salesmen (R. 201, 203; see also R. 114) but conducts its business through the mails (*ibid.*; see also R. 89). It depends upon its catalogues, which it sends out about every ten days, to place its products before its customers (R. 201, 214), of whom about 14,400 are doctors (R. 139, 188). Formerly petitioner's catalogues contained listings of narcotic drugs, but in 1940, after the Bureau of Narcotics had suggested that it discontinue its practice of offering a discount on these drugs, petitioner removed them from the general lists and substituted separate listings on colored sheets which it inserted in its catalogues (R. 200–201, 209, 214–215). Thereafter petitioner quoted prices with the discount already deducted (R. 215). Until the latter part of 1936 petitioner offered morphine sulphate in quantities of 500, 1,000, and 5,000 one-quarter grain and one-half grain tablets, but after that date it quoted the drug in lots of 500 and 1,000 tablets (R. 124, 126, 129; see p. 7, *infra*). Petitioner's prices for narcotic drugs were 30 to 40 per cent less than those charged by other drug houses (R. 89, 112, 113; see also R. 204). Its total annual business was between $300,000 and $350,000 (R. 202), of which the narcotic trade represented about 15 per cent (R. 203).

Dr. John V. Tate is a physician residing at Calhoun Falls, South Carolina (R. 84),[1] and was registered as such under the Harrison Act during the time alleged in the indictment (R. 85, 94). It was asserted in the indictment that none of the other individual defendants were registered under the Act (R. 2).[2] From 1933 until 1940, Dr. Tate received petitioner's catalogues regularly (R. 89). He admitted that he engaged in illicit traffic in morphine, the major portion of which he purchased from petitioner (R. 85, 90–91, 93; see also R. 49, 58, 60–61, 80–84, 84–87).

In August 1936, agent Bransky of the Narcotics Bureau (R. 115) advised petitioner that large quantities of morphine which were being sold by it were finding their way into illegitimate trade and he sought petitioner's cooperation to curb this practice. Petitioner told Bransky that it sold drugs only on order forms submitted by registrants. Bransky told petitioner, however, that experience showed that when a physician ordered half-grain tablets of morphine, it could be assumed that the drug was going into unlawful channels. He said also that the average physician would order only 200 to 400 quarter-grain tablets

[1] Calhoun Falls had a population of 1,832 according to the 1940 census. Sixteenth Census Reports on Population, Vol. I, p. 982.

[2] See also R. 90–91.

per year. (R. 120.)[3] Bransky gave petitioner a list of 204 registered physicians who had been convicted of violating the narcotic laws. Of this number, 55, or approximately 27 per cent, were petitioner's customers. (R. 121–122.) He pointed out to petitioner that other companies listed morphine in lots which did not exceed 100 quarter-grain and half-grain tablets, while petitioner offered lots of as much as 5,000 half-grain tablets (R. 124, 126). Petitioner then changed its listings to lots of 500 and 1,000 tablets (R. 124). Also, at the subsequent request of the Commissioner of Narcotics, petitioner agreed to limit the amount sold on any one order form to 1,000 half-grain tablets (R. 126, 159).

Though petitioner began selling morphine to Dr. Tate in 1934 (R. 169), the sales increased enormously during the period from November 1937 to January 1940. A tabulation of the sales during this latter period of approximately two years and two months (Govt. Ex. 12, R. 173)[4] shows that they increased from 1,000 half-grain tablets per month in the latter part of 1937, to 2,000 per month during most of 1938, and to 5,000 and 6,000

[3] There was expert testimony that the normal dosage of morphine is from one-eighth to one-fourth grain and that one-half grain is administered only in rare cases (R. 37, 38, 118, 162, 163).

[4] This exhibit is not printed in the Record, but is on file, with the other original exhibits, in the office of the Clerk of this Court.

monthly beginning in June 1939. The total purchases during the period covered by the tabulation amounted to 79,000 tablets, 19,000 of which were bought in the last two and one-half months (*ibid.*; see also R. 175). All of these sales were in 1,000 tablet lots (*ibid.*), and they increased in frequency to such an extent that Dr. Tate received shipments at intervals of as little as two and three days (*ibid.*). On one occasion two of his orders arrived at the local post office on the same day (R. 176).

The president of petitioner admitted that he knew Dr. Tate could use and dispense the morphine only in administering to his patients in the legitimate practice of his profession (R. 216-217), and that he was well aware that "doctors, who have been convicted of the improper use of drugs, have been convicted because of the fact that they are not using it in good faith" (R. 216). He admitted also that he knew that the purpose of the Narcotics Bureau's request to limit sales to 1,000 tablets per order was to reduce and eliminate diversion of the drug into unlawful channels (R. 209–210).

ARGUMENT

I

Petitioner's contention that the evidence does not support the verdict (Pet. 19–28) is based upon the premise that there was no proof that it had any knowledge of a conspiracy between Dr.

Tate and the other defendants and that under *United States* v. *Falcone*, 311 U. S. 205, the evidence as to the amount and frequency of its sales of morphine to Dr. Tate does not establish complicity in such a conspiracy.[5] "The verdict of a jury," however, "must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it" (*Glasser* v. *United States*, 315 U. S. 60, 80).

It is settled, of course, that no formal agreement is essential to the formation of a conspiracy; a mutual implied understanding is sufficient. The agreement is generally a matter of inference deduced from acts, conduct, and attendant circumstances. *Glasser* v. *United States*, *supra*; *United States* v. *Manton*, 107 F. (2d) 834, 839 (C. C. A. 2), certiorari denied, 309 U. S. 664; *Marino* v. *United States*, 91 F. (2d) 691, 694 (C. C. A. 9), certiorari denied *sub nom. Gallo* v. *United States*, 302 U. S. 764; *Marx* v. *United States*, 86 F. (2d) 245, 250 (C. C. A. 8); *Telman* v. *United States*, 67 F. (2d) 716, 717 (C. C. A. 10), certiorari denied, 292 U. S. 650; *Goode* v. *United States*, 58 F. (2d) 105, 107 (C. C. A. 8); *Stack* v. *United States*, 27 F. (2d) 16,

[5] *Eckert* v. *United States*, 7 F. (2d) 257 (C. C. A. 8), upon which petitioner also relies (Pet. 8, 22–23) as establishing a conflict of decisions, is not in point. That was a prosecution of a registered druggist for substantive offenses of selling drugs in violation of the Harrison Act and the court specifically noted (p. 257) that the indictment did not charge a conspiracy with the doctor upon whose prescriptions the drugs were sold.

(C. C. A. 9). It is clear, too, that personal acaintance of conspirators with each other is not cessary; it suffices if there is mutual underding and cooperation in furthering the purses of the unlawful enterprise. *Martin* v. *ited States*, 100 F. (2d) 490, 495–496 (C. C. A.), certiorari denied, 306 U. S. 649; *Booth* v. *ited States*, 57 F. (2d) 192, 197 (C. C. A. 10); *ewski* v. *United States*, 13 F. (2d) 599, 602 . C. A. 6), certiorari denied, 273 U. S. 735; *'en* v. *United States*, 4 F. (2d) 688, 691 (C. C. 7), certiorari denied *sub nom. Mullen* v. *United tes*, 267 U. S. 598.

Applying these principles here we think it is ar from the summary of the evidence, *supra*, 4–8, that petitioner's contention is untenable l that the *Falcone* decision, *supra*, is inapposite. In the first place, the evidence was amply suffiat to show a conspiracy between petitioner and . Tate whereby the doctor obtained from petiner by means of his official order forms enorus quantities of morphine for unlawful purses. Such use of order forms is specifically proited by the Harrison Act (I. R. C. § 2554 (g)). e indictment charged a conspiracy to violate s provision, among others (R. 2), and, so far petitioner was concerned, the trial centered and the question whether there was such an awful agreement between it and Dr. Tate (R.). The jury was justified in finding that there

was. Petitioner was bound to know that Dr. Tate was not dispensing the large quantities of morphine which he purchased from it in the legitimate practice of his profession. Dr. Tate practiced in a community of only 1,832 population. He purchased his supply in half-grain tablets in extraordinarily large amounts and at frequent intervals. Petitioner had been advised by agent Bransky in 1936 that in the light of his experience as a narcotic agent the average physician bought only from 200 to 400 quarter-grain tablets a year and that when a physician ordered half-grain tablets it was safe to assume that the drug was being used to supply addicts in violation of the narcotic laws (R. 120). Despite this knowledge, petitioner thereafter sold Dr. Tate 79,000 half-grain tablets in a period of a little over two years, and in the latter part of this period his purchases increased to as much as 6,000 tablets per month. As the court below said (R. 268), "That he [Dr. Tate] could legitimately use 6,000 one-half grain tablets or 12,000 normal doses [see n. 3, p. 7, *supra*] in one month was inconceivable. To use that amount legitimately he would have had to give 400 doses every day to his patients." Petitioner knew that Dr. Tate could not lawfully sell, barter or give away the morphine and that he could dispense it only in the legitimate practice of medicine. Moreover, petitioner affirmatively cooperated with Dr. Tate in the unlawful sale of drugs by means of

its catalogues which were mailed to him every ten days and by making morphine available to him in ever increasing quantities at discount prices. Though petitioner had been requested by the Narcotics Bureau in 1936 to reduce the maximum quantity it advertised for sale and also the amount sold on individual order forms, its compliance with these requests was merely formal, for it sold Dr. Tate as much morphine as he saw fit to order, requiring only that individual orders be limited to 1,000 tablets. (*Supra*, pp. 7–8.) Thus the evidence, with the inferences which may reasonably be drawn therefrom, presents a case where the supplier of a product subject to strict regulation because of its pernicious effects knowingly and actively joins with a distributor in the dissemination of the product for unlawful purposes, rather than a case where the supplier of a commodity not so regulated sells merely with knowledge or suspicion that it may be put to an unlawful use. The cooperation, manifested by this record, between petitioner and Dr. Tate clearly, we submit, spelled out a conspiracy between them.[*]

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[*] Petitioner's arguments (Pet. 20, 21, 24–25) that it complied with the provisions of the Harrison Act in selling morphine to Dr. Tate only upon official order forms and that it followed the suggestion of the Narcotics Bureau that it limit the amount of morphine sold on any one order form to 1,000 tablets, are unavailing, for, obviously, the legality *per se* of the sales may not be used as a shield for unlawful trafficking in drugs. Cf. *United States* v. *Behrman*, 258 U. S.

Furthermore, the case as to petitioner was submitted to the jury upon the theory that they could not convict it unless they found that there was a collusive agreement between it and Dr. Tate. Thus, the trial judge said in his charge that "before you could convict the wholesale druggist of conspiracy, you would have to find that he acted

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280, 288–289; *Webb* v. *United States*, 249 U. S. 96, 99–100; *Heller* v. *United States*, 104 F. (2d) 446, 447–448 (C. C. A. 4); *Friedman* v. *United States*, 260 Fed. 388, 390 (C. C. A. 6), certiorari denied, 250 U. S. 671. Petitioner also complains (Pet. 20) that the courts below misinterpreted its action in advising Dr. Tate on one occasion when he ordered more than 1,000 tablets that he would have to reorder the excess on a new order form (Govt. Ex. 4, R. 90). Whether this action is subject to the innocent explanation offered by petitioner or whether, in view of its course of dealings with Dr. Tate, the action was susceptible of an inference, unfavorable to petitioner, as indicated by the courts below (R. 244–245, 249, 269), was a question for the jury and, of course, on review of a denial of a motion for a directed verdict, the evidence must be viewed in the light most favorable to the Government. *Glasser* v. *United States*, 315 U. S. 60, 80. Petitioner further contends (Pet. 21) that the courts below should not have considered in their decisions sustaining the sufficiency of the evidence certain testimony relating to petitioner's listing of narcotic drugs on separate sheets inserted in its catalogues, because this practice was adopted, according to the testimony of petitioner's president (R. 200–201), in late 1940, subsequent to the period alleged in the indictment. It is true that both courts below adverted to this practice (R. 243, 267–268), but, even without such evidence, they were clearly correct in holding that the motion for a directed verdict was properly denied in view of the evidence which we have discussed at pp. 4–8, *supra*. Moreover, the jury could not have been misled as to the date of the adoption of the practice since they heard the testimony of petitioner's president and the trial court's

in collusion with the doctor as a result of a corrupt agreement or corrupt combination. Mere carelessness on the part of the wholesale druggist or lack of investigation on its part would not be sufficient. It must have sold the drugs knowing it was selling to the doctor at the time and that the purpose of the ordering of the morphine was to satisfy the craving of addicts or for him to sell unlawfully to other people and not in the course of his legitimate practice" (R. 231). [Italics supplied.] In addition, the judge twice specifically told the jury that they could not find petitioner guilty unless they also found Dr. Tate guilty (R. 228, 237–238).

In this view the decision in the *Falcone* case, 311 U. S. 205, is not applicable. The holding there was simply that "one who without more furnishes supplies to an illicit distiller is not guilty of conspiracy even though his sale may have furthered the object of a conspiracy to which the distiller was a party but of which the supplier had

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charge made no reference to the practice (see R. 226–238). Additionally, the indictment, showing the period of the conspiracy, was given to the jury, and they were advised that "The indictment is given you so you may know what the defendants are charged with. The indictment sets out and describes the alleged offense so that you can consider the evidence and the law and find if the defendants are guilty or not guilty, as alleged in the indictment. The indictment is the chart for you to go by" (R. 233; see also R. 227).

no knowledge" (pp. 210–211).[7] The *Falcone* case did not involve the question whether "conviction of conspiracy can rest on proof alone of knowingly supplying an illicit distiller, who is not conspiring with others" (p. 207). The Government conceded that "In such a case * * * the act of supplying or some other proof must import an agreement or concert of action between buyer and seller, which admittedly" was not present in the

[7] It is true that the trial judge also charged the jury on the theory of the *Falcone* decision, i. e., that if there was a conspiracy between Dr. Tate and others the mere fact that petitioner supplied morphine would not be sufficient to convict it of complicity in that conspiracy, but that the jury would have to find that petitioner "'had knowledge of such conspiracy' or there must have been a common design and purpose and guilty cooperation" (R. 234; compare 311 U. S. at 210). Although this theory would, in itself, have constituted a sufficient basis upon which to convict petitioner, it is evident that it could not have been taken by the jury as dispensing with the necessity of a finding by them of the existence of a conspiracy between petitioner and Dr. Tate, because, as we have shown (*supra*, pp. 13–14), the jury was told that they could not convict petitioner unless they found that such a conspiracy existed. It is therefore unnecessary to consider whether there was sufficient evidence to warrant a conviction under the rule of the *Falcone* case, there being adequate evidence to warrant submission to the jury of the question whether there was a conspiracy between petitioner and Dr. Tate.

The view that the evidence showed a separate, smaller conspiracy between petitioner and Dr. Tate does not result in a fatal variance for, obviously, petitioner was not prejudiced in its substantial rights. *Berger* v. *United States*, 295 U. S.

Falcone case (pp. 207–208). In the instant case, we submit, ample proof of a mutual understanding between petitioner and Dr. Tate is found in the systematic course of dealings between them over a period of many years—dealings, moreover, in a commodity the sale and distribution of which, as the district court pointed out (R. 248) and as petitioner well knew (see R. 216), is subject to strict regulation and control. Cf. *Deacon* v. *United States*, 124 F. (2d) 352, 355–356 (C. C. A. 1); *United States* v. *Pandolfi*, 110 F. (2d) 736 (C. C. A. 2), certiorari denied, 310 U. S. 651; *Heller* v. *United States*, 104 F. (2d) 446, 447–448 (C. C. A. 4); *Friedman* v. *United States*, 260 Fed. 388, 390–392 (C. C. A. 6), certiorari denied, 250 U. S. 671.[7]

II

Petitioner contends that the trial judge in his charge erroneously gave the jury the impression

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78, 81–83; *United States* v. *Manton*, 107 F. (2d) 834, 849–850 (C. C. A. 2), certiorari denied, 309 U. S. 664; *Marino* v. *United States*, 91 F. (2d) 691, 698–699 (C. C. A. 9), certiorari denied *sub nom. Gallo* v. *United States*, 302 U. S. 764; *Martin* v. *United States*, 100 F. (2d) 490, 494–495 (C. C. A. 10), certiorari denied, 306 U. S. 649; *Kopald-Quinn & Co.* v. *United States*, 101 F. (2d) 628, 633 (C. C. A. 5), certiorari denied *sub nom. Riesbaum* v. *United States*, 307 U. S. 628. As was pointed out by this Court in the *Berger* case, *supra*, the general rule that allegations and proof must correspond is designed merely to protect the accused against surprise and against a second prosecution for the same offense.

[7] Petitioner attempts (Pet. 28) to buttress its contention by reference to certain remarks made by the trial judge in

that if they convicted Dr. Tate they also had to convict petitioner (Pet. 29). As we have already pointed out, however, what the judge actually instructed the jury was that they could not convict petitioner unless they found that it conspired with Dr. Tate (*supra*, pp. 13–14). This was, of course, entirely proper in view of the theory on which the case as to petitioner was tried. In addition, the judge permitted the jury to convict Dr. Tate of a conspiracy between him and the defendants named in the indictment other than petitioner, even though they found no conspiracy between Dr. Tate and petitioner (R. 228). Petitioner made no objection to the submission of the case on these bases, but, on the contrary, the latter instruction was repeated at the request of petitioner's counsel just before the jury retired (R. 237–238).[9]

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overruling the motion for a directed verdict at the close of all the evidence indicating that he had considerable doubt as to the sufficiency of the evidence and that he thought the case presented a novel question which should be passed upon by the circuit court of appeals (R. 224). However, in his opinion (R. 242–252) overruling petitioner's motion for a new trial (R. 240–241), which was rendered after the judge had had an opportunity to examine the pertinent authorities, he expressed no doubt as to the sufficiency of the evidence to support the verdict. As is apparent from the opinion of the circuit court of appeals, the case is unique in that it involves a charge of conspiracy between a wholesale dealer in drugs and a practicing physician (R. 268); the applicable principles of the law of conspiracy are, however, well established.

[9] Petitioner's attack upon the charge was characterized by the court below as "not worthy of discussion" (R. 269).

CONCLUSION

The decision below is correct, and there is no real conflict of decisions or any question of general importance. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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FEBRUARY 1943.

U. S. GOVERNMENT PRINTING OFFICE: 1943

FILE COPY

APR 9 1943

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BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 593

DIRECT SALES COMPANY, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the district court (R. 21–32) overruling petitioner's plea in abatement and demurrer to the indictment (R. 16–20; 20–21) is reported at 40 F. Supp. 917, and its opinion (R. 242–252) overruling motions for a new trial and for arrest of judgment (R. 240–241) is reported at 44 F. Supp. 623. The opinion of the circuit court of appeals (R. 266–269) is reported at 131 F. (2d) 835.

JURISDICTION

The judgment of the circuit court of appeals was entered November 13, 1942 (R. 269–270). The peti-

tion for a writ of certiorari was filed December 18, 1942, and was granted March 1, 1943 (R. 270). The jurisdiction of this Court is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rule XI of the Rules of Practice and Procedure in Criminal Cases, promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Was the evidence sufficient to warrant the submission to the jury of the issue whether petitioner was a conspirator?

2. Did the trial court's instructions erroneously give the jury the impression that they had to convict petitioner if they convicted Dr. Tate?

STATUTES INVOLVED

The pertinent statutory provisions are copied in the Appendix at pp. 45–53, *infra*.

STATEMENT

On May 26, 1941, a single count indictment was returned in the District Court for the Western District of South Carolina charging petitioner and Dr. John V. Tate, George C. Johnson, Clyde A. Foster, and Reel B. Black with a conspiracy, in violation of Section 37 of the Criminal Code (Appendix, *infra*, p. 45) (R. 1–10). The indictment alleged that from May 1, 1933, to June 10, 1940, at Calhoun Falls, South Carolina, the defendants conspired to defraud the United States of its revenues under the Harrison Narcotic Act, as amended, and

to commit offenses against the United States by violating the provisions of that Act interdicting the obtaining of drugs by means of official order forms for unlawful purposes, the disposition of drugs so obtained without having registered in an appropriate classification and without having paid the prescribed special taxes, and the distribution of drugs except in or from the original stamped packages and except in pursuance of official order forms (see I. R. C. §§ 2553 (a), 2554 (a) and (g), 3220, 3224 (a), Appendix, *infra*, pp. 45–50).[1]

The *modus operandi* of the conspiracy was alleged to be as follows: Petitioner at frequent intervals throughout the period of the conspiracy, by means of circulars, catalogues, and other advertising matter, would, and did, induce Dr. Tate to obtain large quantities of morphine sulphate, with knowledge that Dr. Tate was obtaining these drugs for use other than in the legitimate practice of his profession; that Dr. Tate would thereupon sell large quantities of the drugs, without official order forms and not in or from the original stamped packages, to the defendants Johnson, Foster, and Black and to others unknown to the grand jury,

[1] It was averred in the indictment that the petitioner was registered under the Harrison Narcotic Act, as amended, as a manufacturer of and wholesale dealer in opium, its salts and derivatives, including sulphates (R. 1), that Dr. Tate is a physician who is registered under the Act in his proper class (R. 1–2), and that Johnson, Foster, and Black had not registered or paid the special tax in any class under the Act.

for the purpose of enabling such persons to satisfy their addiction to the drugs, and in turn, to sell them to other persons unlawfully, which they did (R. 2–3).

Fifty-three overt acts were alleged to have been committed in furtherance of the conspiracy (R. 3–9).[2]

The defendants Johnson and Black pleaded guilty (R. 33). During the ensuing trial the defendant Foster suffered a heart attack and by consent of all counsel his case was withdrawn from the jury's consideration (R. 145, 242). The trial proceeded as to petitioner and Dr. Tate (*ibid.*).[3]

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[2] One of the overt acts was the sending by petitioner to Dr. Tate at frequent intervals during the seven-year period covered by the conspiracy of catalogues, price lists, and other advertising matter which held out to Dr. Tate the inducement to buy, by means of official order forms, morphine sulphate and morphine sulphate tablets in large quantities by reason of the discounts offered for the purchase of such quantities (R. 3–4). Twenty-three of the overt acts were sales by petitioner to Dr. Tate of one-half grain morphine sulphate tablets in lots of 1,000, ranging over a period from November 26, 1937, to November 27, 1939 (R. 4–6). Twenty-four of the overt acts consisted of sales by Dr. Tate from June 16, 1939, to January 19, 1940, of one-half grain morphine sulphate tablets to various named individuals, including the defendant Johnson. Four of the overt acts were sales of one-half grain morphine sulphate tablets, without the required official order forms, by the defendant Johnson to the defendants Foster and Black, and one a sale by the defendant Foster to the defendant Black. These sales occurred in September 1939 (R. 9).

[3] Dr. Tate had previously pleaded guilty in October 1940 to an indictment in four counts charging him with making

The evidence may be thus summarized:

Petitioner is a New York corporation which has its principal place of business in Buffalo (R. 1, 33) and conducts a general physicians' supply and drug mail-order business. It is the largest of the seven such businesses in the country (R. 201, 202, 203; see also R. 89, 114). It has registered annually as a manufacturer and wholesale dealer in opium, its salts and derivatives, pursuant to the Harrison Act, and has paid the prescribed special tax for those classes (R. 1, 33, 41, 202). Its total annual sales between 1935 or 1936 and 1940 were between $300,000 and $350,000 (R. 202), of which the narcotic trade represented about 15 percent in dollar volume, although but 2½ percent in unit volume (R. 202–203, 214). It solicits orders through its catalogues and leaflets which it sends out about every ten days to 14,400 physicians throughout the United States (R. 139, 188, 201, 214). It has no salesmen, retailmen or middlemen (R. 201, 203; see also R. 114). Most of its business is with doctors in the small towns rather than the large cities (R. 218).

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sales to Ruby Lamar, an informer, and Albert P. Rogers, a narcotic agent (R. 34, 42, 49–53, 84, 94–95). At least two of the sales were alleged as overt acts in the conspiracy indictment in this case (R. 84, 95–96). While Dr. Tate was summoned and testified as a witness for the Government at the trial below, after consultation with counsel he pleaded not guilty to the conspiracy charge and maintained that he was guilty only of the substantive offenses of sales to individuals (R. 96–97).

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Dr. Tate is a physician who practiced his profession at Calhoun Falls, South Carolina (R. 84), a place which in 1940 had a population of 1,832 (*Sixteenth Census Reports on Population*, Vol. I, p. 982). He was registered as a physician under the Harrison Narcotic Act (R. 85, 94), and, of course, paid only the special tax prescribed for that class. He was entitled to purchase morphine sulphate, a derivative of opium (R. 36), for professional purposes only, by using official order forms furnished by the Collector of Internal Revenue (R. 85). He had been buying drugs from the petitioner for ten or fifteen years (R. 86), and during the period covered by the indictment purchased the major portion of his morphine sulphate from petitioner, on official order forms (R. 85; see also R. 51). In 1939 he was purchasing one-half grain morphine sulphate tablets at a price slightly under $1.50 per hundred (Govt. Ex. No. 1;* see also R. 81–82, 83). In that year, Dr. Tate admitted (R. 90–91, 95–96) and other evidence showed (R. 39–40, 43–44, 45–46, 48, 49, 50, 52, 58–59, 61–62, 64–65, 77), he sold on numerous occasions morphine sulphate to those who were addicts or posed as such. At times these sales were made in bottles containing petitioner's labels (R. 39–40, 52, 62, 63, 65, 77; see also R. 64). Purchases from Dr. Tate were made at frequent intervals by the same persons. The defendant

*This exhibit is not printed in the record but is on file, together with the other original exhibits, in the office of the Clerk of this Court.

Johnson, for example, purchased regularly, once or twice a week (R. 39–40, 61–62, 64, 65, 76–77). On one occasion Dr. Tate told a purchaser that "he was entirely out but he ordered once a week and he would put me on his order. He said his orders were rather heavy because he had some patients that used a considerable amount of the stuff." The purchaser was told to come back "on Saturday week" (R. 45; see also, as to a similar instance, R. 50). It appears that a price ranging from $4 to $8 a hundred was charged by Dr. Tate for one-half grain tablets (R. 45, 50, 53); the doctor explained to one purchaser that the mounting price was due to the war (R. 50). The defendant Johnson, an addict at the time of his purchases from Dr. Tate, was a supplier for other addicts, including the defendants Foster and Black, Foster paying as high as $25 a hundred for one-half grain tablets (R. 65). Black in turn supplied another addict. On one occasion two other addicts accompanied the purchaser to the doctor's office (R. 60, 62, 63, 65, 66, 75, 79).

Petitioner's sales to Dr. Tate were made under the following circumstances:

Dr. Tate received a catalogue or small bulletin from petitioner approximately every ten days from 1933 to 1940 (R. 89, 201, 214). Until the middle of September 1936 the catalogue listed morphine sulphate in quantities of 5,000, 1,000, and 500 tablets, whereas other drug companies listed it in quantities

not to exceed 100 tablets (Govt. Ex. No. 9; R. 124, 126, 198).[5] Until the latter part of 1939 or the beginning of 1940, if not later, the catalogue also offered on purchases of morphine sulphate discounts of 50 percent and an additional 10 percent (R. 201, 209, 215; cf. Govt. Ex. No. 18, R. 155), these prices being 30 to 40 percent lower than those of other wholesalers (R. 89, 111, 113; see also R. 204), which Dr. Tate testified was the main reason he bought from petitioner (R. 111). Dr. Tate's morphine sulphate purchases from petitioner began in a small way in November 1933 (Govt. Exs. Nos. 2, 11), but in the less than six months period from January 6, 1936, to June 19, 1936, he ordered and received 6,700 one-half grain tablets of morphine sulphate from petitioner on official order forms, the orders being placed, mostly, about twice a month (Def. Ex. No. 4; R. 135–136; cf. R. 40–41).

In August 1936 Narcotic Agent Bransky, at petitioner's plant, interviewed Joseph H. Dotterweich, who was petitioner's president, and George Dotterweich, who was then chairman of the board and treasurer but who succeeded his brother, Joseph, as president about September 1, 1936 (R. 119, 197). Bransky told both men that he had been directed to come there by the Commissioner of Narcotics at Washington, D. C. (R. 119), and that he "was there due to large quantities of drugs

[5] Petitioner did, however, sell in lots of less than 500 (R. 129). For 100 tablets the price was one-tenth of that for a thousand, plus ten cents (R. 159, Govt. Ex. No. 7).

which they had been selling to various registrants throughout the United States which had been diverted," and "asked their cooperation to curb this."[6] The two brothers stated that they "didn't desire any test case of the matter" and that "we only sell these narcotic drugs on order forms submitted by registrants * * * and had no way of knowing what disposition was being made of these drugs by the registrants." Bransky then told them that his experience as a narcotic officer[7] had taught him that when a physician ordered *one-half grain* tablets of morphine sulphate it could be assumed that they were to be used to satisfy addiction or other than for legitimate medical purposes (R. 120);[8] also that it had been his experience as an investigator that the average physician throughout the United States

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[6] Bransky's investigation at petitioner's plant covered a period of some six weeks, although he was not there every day (R. 120, 131–133).

[7] Bransky had been a narcotic inspector for twenty-four years, was a doctor of pharmacy and, as a pharmacist during his early years, had filled numerous prescriptions by doctors for narcotics (R. 115, 117–118).

[8] Morphine sulphate, which is, of course, a habit-forming drug (R. 163), is manufactured in one-eighth, one-fourth, and one-half grain tablets (R. 36). There was expert testimony that the practice in the profession is to give one-eighth or one-fourth grain doses and that only in a rare case is a half grain administered to a patient (R. 37, 38, 162; see R. 118). In *United States* v. *Behrman*, 258 U. S. 280, 289, it is stated that "As shown by Woods, *United States Dispensatory*, a standard work in general use, the ordinary dose of morphine is one-fifth of a grain * * *."

would order 200 to 400 *one-fourth* grain tablets of morphine sulphate in a year and if a doctor ordered a larger amount that it was reasonable to assume that he was purchasing the drug for illegitimate uses (R. 120, 134–135, cf. 205, 207–208).[9] He also submitted to them a list, in the form of a letter by him to Joseph Dotterweich, containing the names of 204 physicians who had been convicted of flagrant violations of the federal narcotics law (Govt. Ex. No. 5; R. 121, 122, 123; Def. Ex. No. 6). After examining petitioner's records Bransky advised Joseph Dotterweich that 55 of these 204 physicians had accounts with petitioner (R. 122–123, 140). Bransky was told that "they would cooperate and not send those drugs to those registrants named on that black list" (R. 123). Supplemental lists were submitted from time to time (see *e. g.*, Govt. Ex. No. 6; R. 123).

In the middle of September 1936 Bransky advised George Dotterweich, who was then petitioner's president, that he had examined the catalogues of various drug houses, such as Sharpe & Dohme, Eli Lilly, and Parke-Davis, and that they listed morphine sulphate only in quantities not to exceed

[9] Codein, which is also manufactured in one-eighth, one-fourth, and one-half grain tablets, may be used for the same purposes as morphine sulphate. Although a narcotic, it is very much milder in effect than morphine. One doctor testified that he used 100 doses of codein to one of morphine (R. 164–165). During the period from January 6, 1934, to May 24, 1940, Dr. Tate's order forms showed no purchases of codein from petitioner (Govt. Ex. No. 11; R. 170–171, 218).

100 tablets, whereas "Direct Sales Company had been listing 500,[10] 1,000, and 5,000,"[11] to which George Dotterweich replied, "Oh, I know that" (R. 124). Following further discussions and the preparation of a tentative list limiting single orders by physicians to a maximum of 1,000 tablets (R. 152; Def. Ex. No. 14), the Commissioner of Narcotics on October 20, 1936, wrote petitioner a letter which, in part, stated that "In connection with its policy of restricting the distribution and use of narcotics to legitimate medical purposes, the Bureau is soliciting the active cooperation of manufacturers and wholesale dealers to the end that drugs will not be furnished to practitioners who are known to have been dispensing or selling such drugs for other than legitimate medical purposes, and to the further end that such drugs will not be furnished in any case in excessive quantities," and suggested that "no physician or other practitioner be supplied in excess of 1,000 one-half grain tablets or their equivalent in tablets of other size * * *." Acknowledgment of the letter was requested (Def. Ex. No. 20; R. 159, 160). Petitioner's president, George Dotterweich, admitted that he saw this letter (R. 209), and on October 24, 1936, petitioner, in a letter to the Com-

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[10] It will be noted that this quantity, the minimum listed by petitioner, is more than the average physician would order, even at quarter-grain strength, in an entire year (*supra*, p. 10).

[11] These quantities were listed in one-fourth, one-half grain, and various other strengths (R. 126).

missioner from its office manager, advised that "we will cooperate with you in every way" (Def. Ex. No. 20). At the time of Bransky's interview, if not before, and from then on, George Dotterweich, it is clear, fixed petitioner's policies, was in charge all the time, subjected the employees to his direction, and gave strict attention to the business of petitioner (R. 193, 208–209).

Pursuant to Bransky's suggestion petitioner took steps to insure that no further narcotics would be shipped to doctors whose names appeared on the "black list" of those convicted for violating the narcotic laws (R. 123, 139, 155, 156, 188; Def. Ex. No. 22), revised its catalogue by eliminating its quotation of morphine sulphate tablets in lots of 5,000, listing them instead in lots of 1,000 and 500 tablets (R. 124, 126–127, 129–131, 198–199; Govt. Exs. 9, 10), and, so far as appears from the record, petitioner at no time thereafter shipped to Dr. Tate or any other physician more than 1,000 tablets on a single order form. (See R. 199–200, 210.)

But, despite this appearance of cooperation with the Narcotic Bureau, petitioner continued to honor orders from Dr. Tate for 1,000 one-half grain lots which, at first, came in with the same degree of regularity as they had prior to Bransky's discussions with its officers, and later with progressively increasing frequency (Govt. Exs. Nos. 2, 11, 12, 13; R. 174–175). In the period from November 24, 1937, to January 27, 1940, approximately two years and

two months, petitioner shipped Dr. Tate a total of 79,000 one-half grain tablets, the shipments from June 1939 to January 1940 being at the rate of 5,000 or 6,000 tablets a month (see tabulation in Govt. Ex. No. 12; also Govt. Exs. Nos. 2, 13).[12] Some of these orders were spaced as little as two or three days apart (*ibid.*) and at least once two shipments to Dr. Tate arrived at his post office on the same day (R. 176). Dr. Tate, it was conceded by petitioner's president, George Dotterweich, was one of petitioner's best customers (R. 218), and petitioner's sales to him were, during the whole of the period involved, reflected in monthly reports to the Collector of Internal Revenue in Buffalo which were executed by an officer of the company (R. 187, 188), and after July 1937 also on weekly reports showing the sales of 500 grains or more (R. 189–190).

On one occasion, June 28, 1939, Dr. Tate ordered 100 one-fourth grain and 1,000 one-half grain tablets, and petitioner shipped him the 1,000 one-half grain tablets, writing him on June 30, 1939, that "The maximum quantity any manufacturer can supply on an order is 500 grains Morphine Sulphate, and in view of this we are filling this form for only 1,000 Morphine Sulphate, ½ grain, and omitting the 100 Morphine Sulphate, ¼ grain. Please re-order this on a new Narcotic Order blank

[12] Many of these shipments were charged in the indictment as overt acts Nos. 2–24, inclusive (R. 4–6).

when your present supply is exhausted" (Govt. Ex. No. 4; R. 89-90). Attached to the letter was a sticker in red print stating that due to war condition "Primary markets are uncertain and higher" and "For immediate acceptance to our regular customers, we suggest anticipating your needs at these current discounts without delay," quoting a fifty percent discount on orders of $5 or more, with an extra ten percent on orders of $25 or more, and twenty-five percent on orders of less than $5 (Govt. Ex. No. 4). Three days later, on July 3, 1939, Dr. Tate ordered 1,000 one-half grain tablets and petitioner honored the order. In addition, the company executed five other orders from Dr. Tate during the remainder of July, making a total of 6,000 one-half grain tablets which it shipped to him for the month, more than he had previously received in any one month, and it continued to accept orders thereafter totaling 5,000 or 6,000 one-half grain tablets a month until February 1940 (Govt. Exs. Nos. 2, 12, 13). Petitioner's president, George Dotterweich, did not attempt to excuse these transactions but testified that his company was complying with the letter of the Narcotic Bureau's request for a limitation of shipments to physicians (R. 210); he felt that his company had no obligation to prevent misuse of its products or other violation of the law (R. 216).

Late in 1939 and early in 1940 the Narcotic Bureau corresponded with petitioner requesting it to list its narcotics without a 50 percent and additional 10 percent discount. On February 3, 1940, the Commissioner wrote a letter directed to George Dotterweich, as petitioner's president, stating "The inclusion of Narcotic items within the 50 percent discount provision is still objectionable notwithstanding their exclusion from the additional 10 percent discount and notwithstanding any increase in the listing price. This office is not endeavoring to make narcotics cost the consumer any certain fixed amount but is endeavoring to eliminate from catalogs, circulars and general sales policies all special inducements to buy narcotics, even though such offers may also apply to other items. The obvious intent of a 50 percent discount offer is to stimulate purchases of the items to which it applies, and this, so far as it relates to narcotics, is an objectionable practice" (Def. Ex. No. 18; R. 209). Petitioner, the testimony of its president seems to indicate, did not comply with the Bureau's request to eliminate the 50 percent discount until "in late 1940" (R. 201). At this time petitioner included the discounts in the net price, took narcotics out of the general listing in the catalogue and listed them on a separate pink (or sometimes blue) slip. This slip was not submitted to the Commissioner of Narcotics and was so inserted in the catalogue that it would be apt to fall out when the catalogue was opened by

the recipient. The quotations of 1,000 and 500 tablet lots were printed in conspicuous columns whereas in small type purchasers were advised that they could get 100 tablets at a proportionate price of one-tenth of a thousand, plus ten cents (Govt. Exs. Nos. 7, 8; R. 201, 214–215; see also R. 243, 267–268).[13]

In the meantime, Dr. Tate, after ordering 1,000 one-half grain tablets of morphine sulphate from petitioner on May 24, 1940, refused a shipment at the local post office (Govt. Ex. No. 11; R. 99–

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[13] If the catalogue was not revised until in "late 1940", as petitioner's president seems to indicate in his testimony, the courts below, of course, were in error in referring to the pink or blue slip as having been in use throughout the period covered by the indictment (R. 243, 267–268). It should be pointed out, however, that Govt. Exs. 7 and 8, which are copies of petitioner's catalogues and contain the pink slips, are undated. Except for the testimony of petitioner's president, the evidence does not show when narcotics were first listed in this manner. In any event it is obvious that the jury could not have been misled as to the date of the adoption of the practice since they heard the testimony of petitioner's president and the trial court's charge made no reference to the practice. Additionally, the indictment, showing the period of the alleged conspiracy, was given to the jury and they were advised that "The indictment is the chart for you to go by." (R. 233; see also R. 227). If the practice in question was not adopted until after the expiration of the conspiracy charged, it even more reveals a studied design on the part of petitioner to appeal to the cupidity of those weak-willed physicians who, willing to hazard violation of the narcotic law, were on the lookout for the most economical source of supply, and hence is strongly corroborative of the evidence against petitioner for the period covered by the indictment.

102) and was indicted for and pleaded guilty to making four illegal sales of narcotics.[14]

There was also testimony that on a single order form, in 1936, petitioner ordered 5,000 ounces of morphine or 4,375,000 one-half grains (R. 193) at a saving of seventy-five cents an ounce, the morphine to be withdrawn as needed (R. 128, 206–207, 212),[15] and that in 1934 and 1935 petitioner used 4,900 ounces or 4,287,500 one-half grains of morphine (R. 213).[16]

Petitioner's president, George Dotterweich, admitted on cross-examination that he was aware that the only way a doctor could lawfully dispose of morphine was by personal administration, since he is not permitted to sell it or give it away and that he knew that "doctors, who have been convicted of the improper use of drugs, have been convicted because of the fact that they were not using it in good faith." (R. 216, 217.) He also conceded that his company had been thrice convicted of violations of the Federal Pure Food and Drug Act but claimed that the charges were technical and stated, "Three in thirty years is not

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[14] See footnote 3, *supra*, p. 3.

[15] The petitioner's president, George Dotterweich, testified that the company's need was 200 or 300 ounces a month (R. 207).

[16] Petitioner's president explained that "Some is used in liquids and in other preparations; probably in fifty or sixty different ways (R. 213)."

so bad, according to the way I look at it" (R. 221).

In defense, petitioner's emphasis, as revealed by the cross-examination of the prosecution's witnesses and its own affirmative testimony, was on the facts that the evidence showed that there had not been any personal contact between any one associated with it and Dr. Tate; that Dr. Tate had never in any way advised it that he was selling to persons not registered; that it had never received any money from Dr. Tate other than that paid for the narcotics which he purchased (R. 108–111; 204–205); that, at some expense, it had fully cooperated with the Narcotic Bureau by complying with the various requests of that Bureau's officers and agents (R. 130–131, 138–140, 188, 195–196, 198–201, 205, 215, 220); that it accepted the rulings of the Commissioner and his subordinates "as law"; that it was under no duty to police its customers (R. 208, 216); that monthly or oftener the Government had been advised by petitioner's reports of its sales to Dr. Tate and others and that this had been supplemented by Agent Bransky's examination, while at the company's plant in 1936, of current and prior orders, and that its books and files had also been open to inspection by the Government but that no complaint had ever been made as to its business with Dr. Tate (R. 132–133, 135–138, 187, 189–192, 194, 205–206, 207). Bransky explained, however, that it was not his function to dictate

what orders petitioner should or should not fill; that he merely wanted to see what quantities were being purchased by the various registrants, although he would, of course, have called attention to noncompliance with the law (R. 136–137); that he went into petitioner's plant only for the purpose of "attempting to accomplish the type of set-up resulting in close cooperation between the Direct Sales Company and the Government relative to the carrying out of the provisions of the Harrison Narcotic Act" by giving that company the benefit of his experience "as to what they should fill, what they should not fill and curtailment, etc." (R. 151–152).

Petitioner made a motion for a directed verdict at the conclusion of all the evidence (R. 223–224), which was a renewal of a motion made at the close of the Government's case (R. 183–184). The motion was overruled (R. 223–234), and the case was submitted to the jury as to Dr. Tate and petitioner, the only two defendants then remaining on trial (R. 226). The jury found both defendants guilty (R. 10, 239). After overruling motions for a new trial and in arrest of judgment (R. 240–241) in a comprehensive opinion (R. 242–252),[11] the court sentenced petitioner

[11] This opinion, rendered after mature consideration and after the trial judge had had an opportunity to examine the pertinent authorities, does not express the doubt as to the sufficiency of the evidence which he manifested in overruling the motion for a directed verdict (R. 223–224).

to a fine of $1,000 (R. 253–254). On appeal by petitioner alone this conviction was unanimously affirmed by the Circuit Court of Appeals for the Fourth Circuit (R. 266–270).

SUMMARY OF ARGUMENT

I

United States v. *Falcone*, 311 U. S. 205, is not controlling in this case. In the *Falcone* case the Government attempted, under the aiding and abetting statute, to connect suppliers to distillers of sugar, yeast, and cans to an established conspiracy between the distillers. The evidence failed to show that the respondents knew of the distillers' conspiracy. The instant case, however, was tried and submitted to the jury on the theory that petitioner could be convicted only if it were found that it, the supplier of narcotics, and Dr. Tate, the purchaser, conspired initially to subvert the order form provisions of the narcotic law.

Under established principles of the law of conspiracy, the evidence, with the inferences which may reasonably be drawn therefrom, was sufficient to make out a case for the jury. The evidence of diversion to unlawful uses by Dr. Tate of narcotics obtained from petitioner on order forms makes it manifest that it was his design to subvert the order form provisions of the narcotic law. If there was evidence that petitioner shared this design it cannot be doubted that the

common design was carried out through concerted action. That petitioner shared Dr. Tate's evil design is shown by evidence which establishes that petitioner supplied Dr. Tate, a small town physician, with morphine sulphate tablets of a strength and in quantities and with a frequency and under circumstances which leave no doubt that Dr. Tate was misusing the narcotics. Additionally, with such knowledge, it adroitly and cleverly stimulated and encouraged Dr. Tate to continue purchases from it on order forms.

The case is not one of mere passive indifference or acquiescence to crime; the evidence shows purposive, affirmative cooperation by petitioner with Dr. Tate in carrying out his unlawful venture.

Recurring sales at frequent intervals of large quantities of narcotics to a physician rightfully may have a significance, as has been judicially recognized, which does not attach to similar transactions in such normal articles of commerce as sugar, yeast and cans, with their numerous legitimate uses. Sales of this character are a factor which, at least, may be considered by a jury, along with any other pertinent evidence, in determining whether concert exists between the supplier and the physician.

If it be necessary, as was held by the Circuit Court of Appeals for the Second Circuit in the *Falcone* case, that a party to be convicted as a conspirator must have a "stake in the venture,"

petitioner clearly had such a stake in Dr. Tate's venture. It depended for the financial success of its narcotic drug department upon volume of purchases, and it knew that the average physician such as Dr. Tate could be a "volume" purchaser only if he transgressed the narcotic law.

The Harrison Act and pertinent decisions make it manifest that petitioner is not absolved from guilt by its formalistic compliance with the order form provisions of the statute and its formalistic adherence to the various suggestions or requests of the Narcotic Bureau and its officers in relation to its dealings in narcotics. The evidence in the instant case abundantly evinces that lack of good faith on petitioner's part which a mere formalistic cooperation cannot obscure.

II

The trial judge's instructions, when considered as a whole, are not subject to the construction that the jury had to convict petitioner if they convicted Dr. Tate.

ARGUMENT

I

THERE WAS SUFFICIENT EVIDENCE TO WARRANT THE JURY IN FINDING THAT PETITIONER AND DR. TATE WERE GUILTY OF CONSPIRACY

Although petitioner relies, to a considerable extent, upon the decision of this Court in *United*

States v. *Falcone*, 311 U. S. 205, that decision involved a wholly different problem. There a conspiracy to engage in illicit distilling had been established as to a number of defendants. The respondents sold sugar, cans, and yeast either directly to distillers or to others who resold to distillers under circumstances which showed knowledge only that the materials sold would be used in the distillation of illicit spirits. The Government tried to connect the respondents with the conspiracy between the distillers on the basis of the aiding and abetting statute. The Court held, however, that the evidence did not establish that the respondents knew of the distillers' conspiracy (pp. 208, 210) [18] and that "one who without more furnishes supplies to an illicit distiller is not guilty of conspiracy even though his sale may have furthered the object of the conspiracy to which the distiller was a party but of which the supplier had no knowledge" (p. 211).

In the *Falcone* case the Government did not attempt to link the supplier and distiller in a conspiracy *inter sese*. In its opinion the Court said (pp. 207–208):

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[18] It said, *inter alia* (p. 210) "The evidence respecting the volume of sales to any known to be distillers is too vague and inconclusive to support a jury finding that respondents knew of a conspiracy from the size of the purchases even though we were to assume what we do not decide that the knowledge would make them conspirators or aiders or abettors of the conspiracy".

> The Government does not argue * * * that conviction of conspiracy can rest on proof alone of knowingly supplying an illicit distiller, who is not conspiring with others. In such a case, as the Government concedes, the act of supplying or some other proof must import an agreement or concert of action between buyer and seller, which admittedly is not present here.

In the instant case we have, we think, the type problem which was not before this Court in the *Falcone* case.

The case as to petitioner was tried and submitted to the jury on the theory that petitioner could be convicted only if it were found that petitioner and Dr. Tate had conspired together to subvert the order form provisions of the narcotic law (R. 231). Petitioner's guilt was not made to depend at all upon any guilt of Dr. Tate growing out of his relationship to defendants other than petitioner or upon whether these other defendants were linked with the Tate-Direct Sales conspiracy.[10]

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[10] After reading the indictment, expounding the law of conspiracy, and reading and explaining the order form provisions of the Narcotic Act, the court charged as follows:

> * * * I charge you * * * that under the offense charged in this case, you cannot find the Direct Sales Company guilty and Dr. Tate not guilty. You can find Dr. Tate guilty and the others named in the indictment guilty, but you cannot find the Direct Sales

The general principles of conspiracy law which control this case are well established. A con-

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Company guilty unless you also find Dr. Tate guilty. * * * [R. 228.]

* * * Now, as to this case. If a physician makes an order on an order form supplied by the Department, and in bad faith, and the wholesale druggist acts in collusion with him to violate the law, they may well be guilty of conspiracy, but before you could convict the wholesale druggist of conspiracy, you would have to find that he acted in collusion with the doctor as a result of a corrupt agreement or corrupt combination. Mere carelessness on the part of the wholesale druggist or lack of investigation on its part would not be sufficient. It must have sold the drugs knowing it was selling to the doctor at the time and that the purpose of the ordering of the morphine was to satisfy the craving of addicts or for him to sell unlawfully to other people and not in the course of his legitimate practice. * * * You must find beyond a reasonable doubt that the defendants had guilty knowledge of the conspiracy and were acting in concert together before you could convict. The joinder of the minds of the defendants—that is, that they conspired together and entered into a corrupt agreement—is something which the Government must prove beyond a reasonable doubt, for it is of the essence of the crime charged; without it there can be no criminal conspiracy, and the defendants could not be convicted under this indictment. * * * I charge you that in this case there could be no verdict against the defendants unless you found beyond a reasonable doubt that the defendants had a corrupt agreement between them and had guilty knowledge as alleged in the indictment. * * * [R. 231.] * * * you have to convict both; you cannot convict one; you must convict two or none * * *. [R. 232.]

A portion of this charge was repeated by the court when, in the consideration of oral requests for instructions by petitioner, the following colloquy occurred (R. 237–238):

Mr. MAHONEY. In view of the charge that the jury cannot convict one but must convict two, I ask your Honor to charge that this jury could convict Dr. Tate and the other defendants and find the defendant, Direct Sales Company, not guilty.

spiracy under federal law has been defined by this Court as an agreement to commit an offense

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> The COURT. I did practically charge that before, but I will charge it again. Gentlemen of the Jury, the form of your verdict will be: We, the jury, find the defendants, naming them, guilty; or, we, the jury, find the defendants, naming them, not guilty. As I charged you, you cannot find the Direct Sales Company guilty unless you find Dr. Tate guilty. You can find Dr. Tate and the other defendants guilty. There are no other defendants on trial.
>
> Mr. MAHONEY. Foster is removed.
>
> The COURT. You can find Dr. Tate guilty of having conspired, as alleged in the indictment, and you can find the defendant, Direct Sales Company, not guilty.

In its remarks in overruling the motion for a directed verdict (R. 224) and in its opinion denying the motions for a new trial and in arrest of judgment, the trial court makes it manifest that the real issue before the jury was whether petitioner and Dr. Tate agreed to violate the order form provisions of the narcotics statute. In that opinion the court said, at R. 252, "The trial of this case in reality finally resolved itself into the question of whether or not Direct Sales Company and Dr. Tate agreed to violate this provision [*i. e.*, the provision of Section 2 making it unlawful for any person to obtain by means of an order form narcotic drugs for any purpose other than the use, sale, or distribution thereof by him in the conduct of lawful business in the drugs or in the legitimate practice of his profession]." It said in addition (R. 252):

> * * * Let it be assumed that the other defendants could have successfully maintained that they did not know of this conspiracy between Dr. Tate and the Direct Sales Company. They did not raise the point but plead guilty generally to the indictment. * * * The jury would have been justified in finding that Dr. Tate and Direct Sales Company agreed to violate the quoted portion of Section 2 and that the other defendants knew of such conspiracy and joined it, for the defendant Johnson testified that one of the purchases he made from Dr. Tate was in a bottle of the Direct Sales Company. Likewise the jury would have been justified in finding Dr. Tate and Direct Sales Company guilty of an agreement to violate the above quoted portion of

against the Government, the collective planning of criminal conduct, the confederating or com-

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> Section 2 of the Act and not been concerned at all about the defendants who plead guilty, whether they knew of the conspiracy or not. * * *

And the opinion of the circuit court of appeals makes it abundantly clear that that court affirmed petitioner's conviction on the ground that the evidence established an unlawful agreement or conspiracy between petitioner and Dr. Tate (R. 268).

It is true that sandwiched in amongst various requested charges given evidently at the instance of petitioner is an instruction which reads (R. 234):

> * * * "If an illegal combination or agreement was formed by the doctor and others, the mere fact that the defendant supplied morphine sulphate pursuant to proper order blank is not sufficient. The defendant must have had knowledge of such conspiracy," or there must have been a common design and purpose and guilty cooperation. I added that to it. "Before convicting, the jury must find that the defendant knew of the existence of a conspiracy and with knowledge thereof joined in the same." I charge you that. * * *

Read in its context, it is quite evident that the purpose of this instruction was to caution the jury that petitioner was not accountable for any conspiracy existing between Dr. Tate and his customers unless petitioner knew of the existence of such conspiracy. The effect of this instruction was to remove the case from the periphery of this Court's decision in the *Falcone* case and to focus the jury's attention on the fact that petitioner could not be found guilty unless it had conspired with Dr. Tate. This effect is reinforced by the repeated objections by petitioner to evidence which did not directly concern both it and Dr. Tate (see R. 39, 43, 44, 51, 52–53, 60–61, 63, 65, 79, 80; cf. R. 82).

In any event the instruction as modified by the court cannot be said to be an invalid one since it meets the *Falcone* decision *eis-a-eis*. In consequence, we do not have the situa-

bining for criminal purposes, when attended by an act of one or more of the conspirators to effect the object of the conspiracy.[20] A conspiracy

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tion where a reversal would be required because it is not known upon which of two theories a jury's verdict may be predicated, one of them being untenable (see *Pierce* v. *United States*, 314 U. S. 306, 310; *Williams* v. *North Carolina*, No. 29, present Term, decided by this Court December 21, 1942; *Viereck* v. *United States*, No. 458, present Term, decided by this Court March 1, 1943), since it is perfectly manifest that, under the instructions and upon the theory upon which the case was tried, the jury's verdict must have been based upon the ground that Dr. Tate and petitioner had conspired together.

It was entirely unnecessary for the Government to link the other defendants with the conspiracy between Dr. Tate and petitioner, or to connect petitioner with another conspiracy between Dr. Tate and the other defendants so long as it established an unlawful agreement between Dr. Tate and petitioner. Variance, if any, between the indictment and proof in these respects, or with relation to the establishment of all the objects of the conspiracy, is immaterial, especially since petitioner at no time during the trial or since has claimed that any prejudice resulted. *Berger* v. *United States*, 295 U. S. 78, 81–83; *Kopald-Quinn & Co.* v. *United States*, 101 F. (2d) 628, 633 (C. C. A. 5), certiorari denied, *sub nom. Riesbaum* v. *United States*, 307 U. S. 628; *Martin* v. *United States*, 100 F. (2d) 490, 495 (C. C. A. 10), certiorari denied, 306 U. S. 649; *Beland* v. *United States*, 100 F. (2d) 289, 290–291 (C. C. A. 5), certiorari denied, 306 U. S. 636; *Marino* v. *United States*, 91 F. (2d) 691, 698–699 (C. C. A. 9), certiorari denied, *sub nom. Gullo* v. *United States*, 302 U. S. 764; *Schefano* v. *United States*, 84 F. (2d) 513, 515 (C. C. A. 5); *Breese* v. *United States*, 203 Fed. 824, 831 (C. C. A. 4); cf. *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 246–247.

[20] *Braverman* v. *United States*, 317 U. S. 49, 53; *United States* v. *Falcone*, 311 U. S. 205, 210; *Gebardi* v. *United States*, 287 U. S. 112, 121; *Wong Tai* v. *United States*, 273 U. S. 77,

may have as its object the bringing about of a continuing result, as here, rather than the doing of a single misdeed; nevertheless, it remains but a single conspiracy.[21] The gist of the offense is the unlawful agreement; "The conspiracy is the crime." *Frohwerk* v. *United States,* 249 U. S. 204, 210; *United States* v. *Rabinowich,* 238 U. S. 78, 85–86; *Braverman* v. *United States,* 317 U. S. 49, 53. Direct evidence of the unlawful agreement is rarely available, since generally a conspiracy is hatched in secret. *United States* v. *Rabinowich, supra,* at p. 88. Often times it may be proved only by collocation of apparently disconnected circumstances (*United States* v. *Manton,* 107 F. (2d) 834, 839 (C. C. A. 2), certiorari denied, 309 U. S. 664) or by what the conspirators have done (*Hogan* v. *O'Neill,* 255 U. S. 52, 55; *United States* v. *Harrison,* 121 F. (2d) 930, 934 (C. C. A. 3), certiorari denied, 314 U. S. 661; *Marino* v. *United States,* 91 F. (2d) 691, 698 (C.

81; *Frohwerk* v. *United States,* 249 U. S. 204, 210; *Williamson* v. *United States,* 207 U. S. 425, 447; *Hyde* v. *Shine,* 199 U. S. 62, 76; *Bannon and Mulkey* v. *United States,* 156 U. S. 464, 468; *Dealy* v. *United States,* 152 U. S. 539, 547; *Pettibone* v. *United States,* 148 U. S. 197, 202; *United States* v. *Britton,* 108 U. S. 199, 204; *United States* v. *Hirach,* 100 U. S. 33, 34.

[21] *Braverman* v. *United States,* 317 U. S. 49, 54; *United States* v. *Kissel,* 218 U. S. 601, 607; *Hyde* v. *United States,* 225 U. S. 347, 369; *Brown* v. *Elliott,* 225 U. S. 392, 400; *Ford* v. *United States,* 273 U. S. 593, 602. See also *United States* v. *Borden Co.,* 308 U. S. 188, 202; *Interstate Circuit* v. *United States,* 306 U. S. 208, 227; *In re Snow,* 120 U. S. 274, 281, 286; *United States* v. *Manton,* 107 F. (2d) 834, 839 (C. C. A. 2), certiorari denied, 309 U. S. 664.

C. A. 9), certiorari denied, *sub nom. Gullo* v. *United States*, 302 U. S. 764; *Zito* v. *United States*, 64 F. (2d) 772, 775 (C. C. A. 7)). There is no necessity even that the conspirators should meet together or be personally acquainted [22] or that each know precisely how the illegal object is to be accomplished.[23] It is sufficient to support a conviction for conspiracy that the evidence establish that there is a concurrence of intention or design to commit a criminal offense by concerted action.[24]

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[22] *Braverman* v. *United States*, 125 F. (2d) 283, 285 (C. C. A. 6), reversed on other grounds, 317 U. S. 49; *United States* v. *Feinberg*, 123 F. (2d) 425, 427 (C. C. A. 7), certiorari denied, 315 U. S. 801; *Eley* v. *United States*, 117 F. (2d) 526, 528 (C. C. A. 6); *Jezewski* v. *United States*, 13 F. (2d) 599, 602 (C. C. A. 6), certiorari denied, 273 U. S. 735; cf. *United States* v. *Masonite Corp.*, 316 U. S. 265, 275–276.

[23] *Pierce* v. *United States*, 252 U. S. 239, 244; *Frohwerk* v. *United States*, 249 U. S. 204, 209; *Williamson* v. *United States*, 207 U. S. 425, 449; *Marino* v. *United States*, 91 F. (2d) 691, 696 (C. C. A. 9), certiorari denied, *sub nom. Gullo* v. *United States*, 302 U. S. 764; *Craig* v. *United States*, 81 F. (2d) 816, 822 (C. C. A. 9), certiorari denied, 298 U. S. 690; *Middleton* v. *United States*, 49 F. (2d) 538, 539 (C. C. A. 8); *Jezewski* v. *United States*, 13 F. (2d) 599, 602 (C. C. A. 6), certiorari denied, 273 U. S. 735.

[24] *United States* v. *Patten*, 226 U. S. 525, 543; *Abrams* v. *United States* 250 U. S. 616, 621; *Pierce* v. *United States*, 252 U. S. 239, 244; *Morrison* v. *California*, 291 U. S. 82, 93; *United States* v. *Masonite Corp.*, 316 U. S. 265, 275. See also, *Allen* v. *United States*, 4 F. (2d) 688, 692 (C. C. A. 7), certiorari denied, *sub nom. Hunter* v. *United States*, 267 U. S. 597; *Jezewski* v. *United States*, 13 F. (2d) 599, 602 (C. C. A. 6), certiorari denied, 273 U. S. 735; *Zottarelli* v. *United States*, 20 F. (2d) 795, 798 (C. C. A. 6), certiorari denied, 275 U. S. 571; *Wyatt* v. *United States*, 23 F. (2d) 791, 792 (C. C. A. 3),

Viewing the evidence, with the inferences which may reasonably be drawn therefrom, in the light most favorable to the Government (as we must, *Glasser* v. *United States*, 315 U. S. 60, 80), the case resolves itself, in summary, into this:

The diversion from legitimate practice to the satisfaction of addiction and for resale by Dr. Tate in 1939 of narcotics purchased by him from petitioner on order forms is abundantly established by direct evidence, and it is a necessary inference from the size of the doctor's community and the quantity and frequency of his purchases from petitioner at other times that he was engaged in similar practices during at least a considerable portion of the period covered by the indictment. It is therefore evident that it was the design of Dr. Tate in obtaining narcotics from petitioner to subvert the order form provisions of the narcotics laws.

If there was adequate evidence to establish that petitioner shared Dr. Tate's evil design, this was sufficient to warrant its conviction, for there

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certiorari denied, 277 U. S. 588; *Booth* v. *United States*, 57 F. (2d) 192, 197 (C. C. A. 10); *Lefco* v. *United States*, 74 F. (2d) 66, 68–69 (C. C. A. 3); *Laska* v. *United States*, 82 F. (2d) 672, 674 (C. C. A. 10), certiorari denied, 298 U. S. 689; *Short* v. *United States*, 91 F. (2d) 614, 618 (C. C. A. 4); *Wilder* v. *United States*, 100 F. (2d) 177, 182 (C. C. A. 10); *Beland* v. *United States*, 100 F. (2d) 289 (C. C. A. 5), certiorari denied, 306 U. S. 636; *United States* v. *Anderson*, 101 F. (2d) 325, 330 (C. C. A. 7), certiorari denied, 307 U. S. 625; *Oliver* v. *United States*, 121 F. (2d) 245, 249 (C. C. A. 10), certiorari denied, 314 U. S. 666; 89 U. of Pa. L. Rev. 624, 632; 48 Yale Law Journal 1447, 1448.

can be no doubt that the common design was carried out through concerted action. Petitioner was the supplier through whom, by order forms, Dr. Tate constantly secured the morphine with which to engage in his illicit practice. That the jury was entitled to believe from the evidence as a reasonable inference that petitioner was a party to Dr. Tate's evil design is shown by the following facts:

Petitioner had been a supplier of narcotics to physicians for a number of years. It was one of the largest houses of its kind in the country. It knew that under the law doctors were required to dispose of morphine by personal administration and were not entitled to sell it, and that the highest good faith was required of the doctor who obtained narcotics pursuant to an official form. It also knew that Dr. Tate was a small town physician, as were most of the doctors who ordered from it. In 1936 a narcotics agent advised petitioner that it was being used as a source of supply by doctors who had been convicted of flagrant violations of the narcotic law, submitting to petitioner a list which showed that 55 of the 204 doctors who had been so convicted, or over 26 percent, were petitioner's customers.[28]

[28] It is interesting to note that at or about this time (1936) there were some 1,350 wholesale dealers in the United States from whom doctors might order narcotics (see p. 41 of *Traffic in Opium and Other Dangerous Drugs for the Year Ended December 31, 1941*, published by the United States Treasury Department, Bureau of Narcotics, Washington, D. C., pursuant to the requirements of the Act of June 14, 1930).

This same agent, one of long experience, also advised petitioner, in a spirit of cooperation, that it had been his experience that the average physician throughout the country would order no more than 200 to 400 one-quarter grain tablets in an entire year. If it had not been aware before, it certainly was then put on notice, that Dr. Tate could not possibly use legitimately the thousands of one-half grain tablets of morphine sulphate which it was shipping to him periodically.[26] Yet, although from that moment on petitioner paid lip service to its avowals of cooperation with the Narcotic Bureau in that bureau's effort to curb the diversion of narcotic drugs into illicit channels, its sabotaging of that program was as effective as could be imagined. While, as requested, it eliminated the listing of tablets in lots of 5,000, it continued to offer the listings of 1,000 and 500 tablets at discounts which made the price most attractive, as compared with that of other drug houses, to any who, like Dr. Tate, were seeking the most economical source of supply in order to derive the greatest profit from their illicit traffic. And although, in ostensible conformity with its understanding with the Narcotic Bureau, it honored no order from Dr. Tate for

[26] Petitioner could not have been oblivious to the fact that Dr. Tate ordered no codein. There is virtually no codein addiction in this country (p. 23, *Traffic in Opium and Other Dangerous Drugs for the Year Ended December 31, 1939*, published by Bureau of Narcotics, Treasury Department; p. 14, *ibid.* 1940).

more than 1,000 tablets, it continued to fill his orders for that amount at one-half grain strength, a dosage which it had been advised was rarely used by physicians, and at a frequency which removes from the field of conjecture the conclusion that it must have known that Dr. Tate was using the drugs for illegitimate purposes. Thus, in the period of slightly over two years between November 24, 1937, and January 27, 1940, it shipped Dr. Tate 79,000 one-half grain tablets and in the last six months of 1939 its shipments reached the enormous quantities of 5,000 and 6,000 one-half grain tablets a month, enough, said the courts below (R. 247, 268), to have permitted Dr. Tate to give 400 doses every day to his patients. Aside from the fact that such enormous shipments to a doctor who proved to be one of petitioner's best customers could hardly have escaped the attention of those responsible for petitioner's management, its sales to Dr. Tate were reflected periodically in its monthly and weekly official reports. But the connivance of petitioner in Dr. Tate's unlawful enterprise reached its apex when in June 1939, during the indictment period, it refused to honor an excess over Dr. Tate's usual 1,000 one-half grain tablet order of 100 one-quarter grain tablets and advised Dr. Tate to reorder the 100 tablets on a separate order form but, at the same time, suggested by a sticker in red print attached to its letter that Dr. Tate should anticipate his future

needs and take advantage of the discounts offered. Clearly, although it did not in terms expressly say so, petitioner's communication could have left no doubt in the doctor's mind that more orders were solicited so long as a single order did not exceed 1,000 tablets. That Dr. Tate did not lose the full significance of petitioner's invitation is evident from the fact that only three days later he placed an order for 1,000 one-half grain tablets, which was honored, as were similar later orders which ultimately reached the preposterous total of 5,000 or 6,000 one-half grain tablets a month. The lack of good faith of petitioner in dealing with its narcotics trade is also illustrated by its shenanigan, apparently "in late 1940," of eliminating, in apparent cooperation with the Narcotic Bureau, its 50 and additional 10 per cent discounts but at the same time quoting the same price as a net price and inviting attention to the attractiveness of its prices through a colored slip inserted in its catalogue in such manner that it would easily dislodge itself and thus obtain the desired scrutiny.[37]

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[37] At the trial Dr. Tate, on cross-examination, when asked "Did they [petitioner] have any knowledge whatsoever, as you testified yesterday, that you were selling to people not registered," he replied, "No, I don't suppose they did" (R. 109). However, in the face of the testimony to which reference has been made, reliance can not be placed, to destroy the concurrence of evil intention, on Dr. Tate's claimed supposition as to the state of petitioner's mind, since, as this Court has held, in conspiracy, as in other crimes, "Men must be held to have intended, and to be accountable for, the effects

It must be evident that this case is not one where a conspiracy is attempted to be spelled out because of mere passive acquiescence or indifference to crime. See, *e. g.*, *Di Bonaventura* v. *United States*, 15 F. (2d) 494 (C. C. A. 4).[28] Petitioner sold to Dr. Tate under circumstances which leave no room for doubt that it knew that he was misusing the narcotics and, additionally, with such knowledge, it adroitly and cleverly continually stimulated and encouraged him to continue in his unlawful venture. Its action was purposive, affirmative, and cooperative.[29]

It is recognized, of course, that one or two isolated transactions of sale of narcotics, even in large quantities, while perhaps creating suspicion, might not justify conviction for conspiracy, but sales in the quantities and with the frequency and under the circumstances disclosed by the evidence in this case allow no leeway for speculation or conjecture as to whether the supplier joined with the vendee in his unlawful conduct. As showing guilty

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which their acts were likely to produce." *Abrams* v. *United States*, 250 U. S. 616, 621. See also *United States* v. *Patten*, 226 U. S. 525, 543; *United States* v. *Masonite Corp.*, 316 U. S. 265, 275.

[28] See also, *United States* v. *Dellaro*, 99 F. (2d) 781 (C. C. A. 2).

[29] *United States* v. *Cusimano*, 123 F. (2d) 311, 613 (C. C. A. 7); *United States* v. *Harrison*, 121 F. (2d) 930, 933, 934 (C. C. A. 3), certiorari denied, 314 U. S. 661; *United States* v. *Pecoraro*, 113 F. (2d) 245, 246 (C. C. A. 2), certiorari denied, 312 U. S. 685; *United States* v. *Pandolfi*, 110 F. (2d) 736, 737 (C. C. A. 2), certiorari denied, 310 U. S. 651; *Zito* v. *United States*, 64 F. (2d) 772, 775 (C. C. A. 7).

knowledge and design, recurring sales at frequent intervals of large quantities of narcotics to a physician rightfully may have a significance[30] which does not necessarily attend upon similar transactions in commodities such as sugar, yeast and cans. Such commodities are normal articles of commerce and have, of course, numerous legitimate uses; illegitimate utilization is relatively infrequent. Narcotic drugs have a comparatively limited field in the legitimate practice of medicine,[31] and their deleterious nature, when misused, has been recognized by this Court.[32] Elaborate safeguards have been embodied in the federal narcotic laws in the effort to curb, so far as possible, their diversion into illegal channels and their resulting misuse. Certainly, quantity and frequency of sales is a factor which at least may be considered by a jury, along with any other pertinent evidence, in determining whether collusion exists with the phy-

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[30] Cf. *Webb* v. *United States*, 249 U. S. 96; *Jin Fuey Moy* v. *United States*, 254 U. S. 189, 193, 194; *United States* v. *Behrman*, 258 U. S. 280, 288–289; *Linder* v. *United States*, 268 U. S. 5, 20, 22; *Ratigan* v. *United States*, 88 F. (2d) 919, 923, certiorari denied, 301 U. S. 705; *Friedman* v. *United States*, 260 Fed. 388, 391, 392 (C. C. A. 6), certiorari denied, 250 U. S. 671.

[31] A doctor of long experience testified at petitioner's trial that "The purpose of morphine is to ease pain and act as a sedative to inflamed mucous membrane as in the respiratory tract and such as that" (R. 163) and that even for this purpose codein, which is "very much milder in effect," can be used as a substitute (R. 164).

[32] *Casey* v. *United States*, 276 U. S. 413, 418; *Yee Hem* v. *United States*, 268 U. S. 178, 184.

sician. *Friedman* v. *United States*, 260 Fed. 388, 391–392 (C. C. A. 6), certiorari denied, 250 U. S. 671. Petitioner, a dealer in narcotics of consequence and of long standing, can hardly place upon itself the mantle of an indifferent seller of a normal article of commerce; it is clear on the contrary that petitioner cleverly and adroitly solicited unlawful narcotic trade.[35]

If, as was held by the Circuit Court of Appeals for the Second Circuit in the *Falcone* case (109 F. (2d) 579, 581), a party to be convicted as a conspirator must have "a stake in the venture," petitioner herein had the stake. It is true that Dr. Tate did not divide his profits with petitioner and that petitioner received no more than its sales price. Nevertheless, in any reason-

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[35] Petitioner did in fact obtain more than a normal share of the unlawful narcotic trade indulged in by doctors, for, although there were, in 1936 and previous thereto, more than 1,350 wholesale dealers in the United States from whom doctors might order narcotics (See page 41 of *Traffic in Opium and Other Dangerous Drugs for the Year Ended December 31, 1941*, published by the United States Treasury Department, Bureau of Narcotics, Washington, D. C., pursuant to the requirements of the Act of June 14, 1930), 55 of the 214 doctors, or approximately 26 per cent, convicted in 1936 or previous thereto of violating the narcotic laws were petitioner's customers.

[1] This concept is one, however, which did not receive express approbation in this Court's decision in that case and has been frowned upon elsewhere. See *Backun* v. *United States*, 112 F. (2d) 635, 637 (C. C. A. 4); see also *United States* v. *Harrison*, 121 F. (2d) 930, 933 (C. C. A. 3), certiorari denied, 314 U. S. 661.

able sense of the term "stake" petitioner had it in Dr. Tate's venture. Its narcotic business accounted for a substantial portion of its income (15 percent), although in unit volume narcotics constituted only a small percentage of the articles which it sold (2 percent). It sold the drugs at considerably less (30 to 40 percent) than did other drug houses, several of whom were of nation-wide reputation; and it had a field for its narcotics which was comparatively limited (14,400 doctors) and which was shared by many other suppliers (1,350). Depending, therefore, as it did, upon the volume of its sales for the financial success of its narcotic drug department, it is apparent that petitioner had a real stake in its business with those physicians upon whom it could rely to furnish the necessary volume. Compare *United States* v. *Pecoraro*, 115 F. (2d) 245, 246 (C. C. A. 2), certiorari denied, 312 U. S. 685. And it knew that the average physician could be a "volume" purchaser only if he transgressed the narcotic law.

Petitioner places its greatest emphasis, it would seem, upon its formalistic compliance with the order form provisions of the statute and upon its formalistic adherence to the various suggestions or requests made by the Narcotic Bureau and its officers in relation to petitioner's dealings in narcotics. It asserts that it never sold to Dr. Tate, except upon official order forms, that the statute places no ceiling on amounts to be honored in

any orders received by a manufacturer or wholesaler, that the Government, although it had been advised of the extent of Dr. Tate's purchases by petitioner's periodic reports and by inspection of petitioner's records, had registered no objection, and that the requests and suggestions of the Commissioner of Narcotics and his assistants were interpretations of the law, upon which it was entitled to rely.[35] Petitioner's argument, of course, misconceives the nature of the Harrison Act and the functions of the narcotic officers thereunder. The Act is a revenue measure with a moral end, fortified by criminal sanctions.[36] While the act lays down certain standards of conduct noncompliance with which subjects the offender to penalties and punishment, it is in no sense a licensing statute. The Commissioner cannot take away the registrant's right to do business or to practice his profession merely because he does not like the way the registrant behaves himself. He may suggest but cannot command. He must, as is abundantly illustrated by the numerous decisions, depend upon the criminal

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[35] It is undisputed that federal officers did not prevail upon petitioner to operate its business in the manner now condemned, but if they had, even that fact would apparently not be a defense. *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 225–227.

[36] *United States* v. *Jin Fuey Moy*, 241 U. S. 394, 402; *United States* v. *Doremus*, 249 U. S. 86, 94; *United States* v. *Balint*, 258 U. S. 250, 253, 254; *Linder* v. *United States*, 268 U. S. 5, 17, 22.

courts to discourage evasion of the statute's standards. The statute itself amply discloses that mere reliance upon prescription blanks or order forms will not absolve from guilt if there is a misuse of these indicia of regularity (Appendix, pp. 47–49, 50, *infra*).[37] Absent "good faith" the prescription blank or the order form is but a scrap of paper. While, of course, the wholesaler and the retailer of narcotic drugs are not required to "police" their customers, nonaction is a far cry from cooperation with those customers to subvert the law.[38] Despite petitioner's protest that it cooperated with the Narcotic Bureau, the evidence in the instant case abundantly manifests a lack of good faith which mere formalism cannot obscure.

While the case is novel (R. 223), it is so only in the sense that this is apparently the first one in which the Government has linked a registered

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[37] *United States* v. *Behrman*, 258 U. S. 280, 287; *Jin Fuey Moy* v. *United States*, 254 U. S. 189; *Webb* v. *United States*, 249 U. S. 96, 99–100; cf. *Linder* v. *United States*, 268 U. S. 5, 17–18; see also, *Friedman* v. *United States*, 260 Fed. 388, 390 (C. C. A. 6), certiorari denied, 250 U. S. 671; *Saunders* v. *United States*, 260 Fed. 386, 388 (C. C. A. 6).

[38] If the decisions in *Eckert* v. *United States*, 7 F. (2d) 257 (C. C. A. 8), and *United States* v. *Joseph Fleming & Son*, 251 Fed. 932 (W. D. Pa.), cited by petitioner, are sound (compare, however, the decisions of this Court in footnote 37), they at least recognize that the retail druggist may not collude with the physician to violate the law. They have no other relevance here since it is well settled that the overt acts need not themselves be criminal to support a conviction for conspiracy. *Braverman* v. *United States*, 317 U. S. 49, 53.

wholesale dealer in narcotics[38] with a practicing physician as conspirators (R. 268). But the errant doctor, as the books illustrate, has often been successfully tied up in a conspiracy with that other source of supply, the collusive druggist,[39] and there should be no reason why any different rule of criminal liability should prevail. The controlling principles of conspiracy law are the same.

II

THE TRIAL JUDGE CLEARLY DID NOT, IN HIS INSTRUCTIONS TO THE JURY, CREATE THE IMPRESSION THAT THE JURY HAD TO CONVICT PETITIONER IF THEY CONVICTED DR. TATE

Petitioner's contention that the trial judge erroneously gave the jury the impression that they had to convict petitioner if they convicted Dr. Tate is patently frivolous. While the district court did state at one point in its charge that "you have to convict both; you cannot convict one; you must convict two or none" (R. 232) and at an-

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[38] Of course, so far as the facts of the instant case are concerned, petitioner's relationship with Dr. Tate was actually that of a retailer, unless Dr. Tate be himself considered as a retailer.

[39] Cf. *Webb* v. *United States*, 249 U. S. 96; *Heller* v. *United States*, 104 F. (2d) 446 (C. C. A. 4); *Friedman* v. *United States*, 260 Fed. 388, certiorari denied, 250 U. S. 671; see also, *Linder* v. *United States*, 268 U. S. 5, 20; *Jin Fuey Moy* v. *United States*, 254 U. S. 189.

other time "you cannot convict one without both" (R. 234), this language was clearly designed to emphasize the fact that, before the jury could convict petitioner, it was necessary for them to find a collusive agreement between petitioner and Dr. Tate and, consequently, to find Dr. Tate guilty also. This theory was explained in several places in the charge, but at the same time the court made it manifest both during its charge and during a colloquy with petitioner's counsel in connection with oral requests for instructions that Dr. Tate could be convicted alone, upon the basis of his relationship with defendants other than petitioner.[41] The court's instructions must, of course, be considered as a whole and since, so considered, the alleged objectionable language is not subject to misconstruction, the charge cannot be considered as erroneous. *United States* v. *McCann*, 32 F. (2d) 540, 542 (C. C. A. 2), certiorari denied, 280 U. S. 559; *Kaufmann* v. *United States*, 282 Fed. 776, 785 (C. C. A. 3), certiorari denied, 260 U. S. 735; *Degnan* v. *United States*, 271 Fed. 291, 293 (C. C. A. 2).

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[41] See footnote 19, *supra*, pp. 24–26.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgment below should be affirmed.

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APRIL 1943.

APPENDIX

Section 37 of the Criminal Code, the general conspiracy statute, (18 U. S. C. 88) provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both.

Sections 1 and 2 of the Harrison Narcotic Act, as amended, as reproduced in the Internal Revenue Code, provide in part:

Section 1, as amended:

> I. R. C. § 3220. *Tax.*
>
> On or before July 1 of each year every person who imports, manufactures, produces, compounds, sells, deals in, dispenses, or gives away opium or coca leaves, or any compound, manufacture, salt, derivative, or preparation thereof, shall pay the special taxes hereinafter provided. * * *
>
> * * * * *
>
> (b) *Wholesale dealers.*
>
> Wholesale dealers, lawfully entitled to sell and deal in any of the aforesaid drugs, $12 per annum;
>
> (c) *Retail dealers.*
>
> Retail dealers, lawfully entitled to sell and deal in any of the aforesaid drugs, $3 per annum;

(d) *Physicians, dentists, veterinary surgeons, and other practitioners.*

Physicians, * * * lawfully entitled to distribute, dispense, give away, or administer any of the aforesaid drugs to patients upon whom they in the course of their professional practice are in attendance, $1 per annum or fraction thereof during which they engage in any of such activities;

* * * * *

I. R. C. § 3221. *Registration*—(a) *Requirements.*

On or before July 1 of each year every person who engages in any of the activities enumerated in section 3220 shall register with the collector of the district his name or style, place of business and place or places where such business is to be carried on, and every person upon first engaging in any such activities shall immediately make like registration.

* * * * *

I. R. C. § 3224. *Unlawful acts in case of failure to register and pay special tax*—(a) *Trafficking.*

It shall be unlawful for any person required to register under the provisions of this part or section 2551 (a) to import, manufacture, produce, compound, sell, deal in, dispense, distribute, administer, or give away any of the aforesaid drugs without having registered and paid the special tax as imposed by this part, or section 2551 (a).

* * * * *

I. R. C. § 3228. *Definitions*—(a) *Person.*

The word "person" as used in this part and subchapter A of chapter 23 shall be construed to mean and include a partner-

ship, association, company, or corporation, as well as a natural person.

* * * * *

(c) *Wholesale dealer.*

Every person who sells, or offers for sale, any of said drugs in the original stamped packages as provided in section 2553 (a) shall be deemed a wholesale dealer.

(d) *Retail dealer.*

Every person who sells or dispenses from original stamped packages as provided in section 2553 (a) shall be deemed a retail dealer: * * *

I. R. C. § 2553. *Packages*—(a) *General requirement.*

It shall be unlawful for any person to purchase, sell, dispense, or distribute any of the drugs mentioned in section 2550 (a) except in the original stamped package or from the original stamped package; and the absence of appropriate tax-paid stamps for any of the aforesaid drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession same may be found; and the possession of any original stamped package containing any of the aforesaid drugs by any person who has not registered and paid special taxes as required by sections 3221 and 3220 shall be prima facie evidence of liability to such special tax.

(b) *Exceptions in case of registered practitioners.*

The provisions of subsection (a) shall not apply—

(1) *Prescriptions.*

To any person having in his or her possession any of the drugs mentioned in section 2550 (a) which have been obtained from a registered dealer in pursuance of

a prescription, written for legitimate medical uses, issued by a physician, dentist, veterinary surgeon, or other practitioner registered under section 3221; and where the bottle or other container in which such drug may be put up by the dealer upon said prescription bears the name and registry number of the druggist, serial number of prescription, name and address of the patient, and name, address, and registry number of the person writing said prescription; or

(2) *Dispensations direct to patients.*

To the dispensing, or administration, or giving away of any of the aforesaid drugs to a patient by a registered physician, dentist, veterinary surgeon, or other practitioner in the course of his professional practice, and where said drugs are dispensed or administered to the patient for legitimate medical purposes, and the record kept as required by this subchapter of the drugs so dispensed, administered, distributed, or given away.

Section 2, as amended:

I. R. C. § 2554. *Order forms—(a) General requirement.*

It shall be unlawful for any person to sell, barter, exchange, or give away any of the drugs mentioned in section 2550 (a)[1] except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary.

* * * * *

[1] *I. e.*, "opium, coca leaves, any compound, salt, derivative, or preparation thereof."

(e) *Other exceptions.*

Nothing contained in this section, section 2563, or section 2564 shall apply—

(1) *Use of drugs in professional practice.*

To the dispensing or distribution of any of the drugs mentioned in section 2550 (a) to a patient by a physician, dentist, or veterinary surgeon registered under section 3221 in the course of his professional practice only: *Provided*, That such physician, dentist, or veterinary surgeon shall keep a record of all such drugs dispensed or distributed, showing the amount dispensed or distributed, the date, and the name and address of the patient to whom such drugs are dispensed or distributed, except such as may be dispensed or distributed to a patient upon whom such physician, dentist, or veterinary surgeon shall personally attend; and such record shall be kept for a period of two years from the date of dispensing or distributing such drugs, subject to inspection, as provided in section 2556.

(2) *Prescriptions.*

To the sale, dispensing, or distribution of any of the drugs mentioned in section 2550 (a) by a dealer to a consumer under and in pursuance of a written prescription issued by a physician, dentist, or veterinary surgeon registered under section 3221: *Provided, however*, That such prescription shall be dated as of the day on which signed and shall be signed by the physician, dentist, or veterinary surgeon who shall have issued the same: *And provided further*, That such dealer shall preserve such prescription for a period of two years from the day on which such prescription is filled in such a way as to be readily accessible to inspection by the

officers, agents, employees, and officials mentioned in section 2556.

* * * * *

(d) *Preservation.*

Every person who shall accept any order required under subsection (a), and in pursuance thereof shall sell, barter, exchange, or give away any of the drugs mentioned in section 2550 (a), shall preserve such order for a period of two years in such a way as to be readily accessible to inspection by any officer, agent, or employee of the Treasury Department duly authorized for that purpose, and the State, Territorial, District, municipal, and insular officials named in section 2556.

(e) *Duplicates.*

Every person who shall give an order as provided in this section to any other person for any of the drugs mentioned in section 2550 (a) shall, at or before the time of giving such order, make or cause to be made a duplicate thereof on a form to be issued in blank for that purpose by the Secretary, and in case of the acceptance of such order, shall preserve such duplicate for said period of two years in such a way as to be readily accessible to inspection by the officers, agents, employees, and officials mentioned in section 2556.

(f) *Supply.*

The Secretary shall cause suitable forms to be prepared for the purposes above mentioned, and shall cause the same to be distributed to collectors for sale by them to those persons who shall have registered and paid the special tax as required by sections 3221 and 3220 in their districts, respectively; and no collector shall sell any of such forms to any persons other than a person who has registered and paid the

special tax as required by said sections in his district. * * *

(g) *Unlawful use.*

It shall be unlawful for any person to obtain by means of said order forms any of the aforesaid drugs for any purpose other than the use, sale, or distribution thereof by him in the conduct of a lawful business in said drugs or in the legitimate practice of his profession.

* * * * *

The following provisions of the Internal Revenue Code relate to the records, books, and returns required to be kept and made by registrants and authorize inspection by authorized officials of the returns, duplicate order forms and prescriptions:

I. R. C. § 2555. *Records, statements, and returns*—(a) *General Requirement.*

Every person liable to any tax imposed by this subchapter or section 3220, or for the collection thereof, shall keep such records, render under oath such statements, make such returns, and comply with such rules and regulations, as the Secretary may from time to time prescribe.

(b) *Books and monthly returns of importers, manufacturers, and wholesale dealers.*

Importers, manufacturers, and wholesale dealers shall keep such books and records and render such monthly returns in relation to the transactions in the aforesaid drugs as the Secretary may by regulations require.

(c) *Returns by registrants of drugs received*—(1) *Requirement.*

Any person who shall be registered in any internal revenue district under the pro-

visions of section 3221 shall, whenever required so to do by the collector of the district, render to the said collector a true and correct statement or return, verified by affidavit, setting forth the quantity of the aforesaid drugs received by him in said internal revenue district during such period immediately preceding the demand of the collector, not exceeding three months, as the said collector may fix and determine; the names of the persons from whom the said drugs were received; the quantity in each instance received from each of such persons, and the date when received.

The penalty provisions, derived from Section 9 of the Harrison Act and from complementary statutes, read in part, as follows:

> I. R. C. § 2557. *Penalties*— * * *
> (b) *Violations in general.*
> (1) Any person who violates or fails to comply with any of the requirements of this subchapter or part V of subchapter A of chapter 27, shall, on conviction, be fined not more than $2,000 or be imprisoned not more than five years, or both, in the discretion of the court.
> (2) Any person required under this subchapter or section 3220 to pay any tax, or required by law or regulations made under authority thereof to make a return, keep any records, or supply any information, for the purposes of the computation, assessment, or collection of any tax imposed by this subchapter or section 3220, who willfully fails to pay such tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, be fined not

more than $10,000, or imprisoned for not more than one year, or both, together with the costs of prosecution.

(3) Any person required under this subchapter or section 3220 of chapter 27 to collect, account for and pay over any tax imposed by this subchapter or said section 3220, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this subchapter or section 3220 or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

(4) Any person who willfully fails to pay, collect, or truthfully account for and pay over, any tax imposed by this subchapter or section 3220 or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty of the amount of the tax evaded, or not paid, collected or accounted for and paid over, to be assessed and collected in the same manner as taxes are assessed and collected. * * *

* * * * *

(8) The term "person" as used in paragraphs (2), (3) and (4) includes an officer or employee of a corporation or a member or employee of a partnership, who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs.

U. S. GOVERNMENT PRINTING OFFICE 1943

SUPREME COURT OF THE UNITED STATES.

No. 593.—October Term, 1942.

Direct Sales Company, Inc., Petitioner, *vs.* United States of America. } On Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

[June 14, 1943.]

Mr. Justice Rutledge delivered the opinion of the Court.

Petitioner, a corporation, was convicted of conspiracy to violate the Harrison Narcotic Act.[1] It challenges the sufficiency of the evidence to sustain the conviction. Because of asserted conflict with *United States* v. *Falcone*, 311 U. S. 205, certiorari was granted.

Petitioner is a registered drug manufacturer and wholesaler.[2] It conducts a nationwide mail-order business from Buffalo, New York. The evidence relates chiefly to its transactions with one Dr. John V. Tate and his dealings with others. He was a registered physician, practicing in Calhoun Falls, South Carolina, a community of about 2000 persons. He dispensed illegally vast quantities of morphine sulphate purchased by mail from petitioner. The indictment charged petitioner, Dr. Tate, and three others, Black, Johnson and Foster, to and through whom Tate illegally distributed the drugs, with conspiring to violate Sections 1 and 2 of the Act,[3] over a period extending from 1933 to 1940. Foster was granted a severance, Black and Johnson pleaded guilty, and petitioner and Dr. Tate were convicted. Direct Sales alone appealed. The Circuit Court of Appeals affirmed. 131 F. 2d 835.

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1 The conspiracy statute, R. S. § 5440, as amended, 18 U. S. C. § 88, provides:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both."

The pertinent provisions of the Harrison Act are set out in note 3, *infra*.

2 38 Stat. 785, as amended, 26 U. S. C. §§ 3220, 3221.

3 38 Stat. 785, as amended, 26 U. S. C. §§ 2553, 2554. The indictment charged the conspiracy's object was to violate those portions of the Act (as amended) which provide:

"It shall be unlawful for any person required to register under the provisions of this part or section 2551 (a) to import, manufacture, produce, compound, sell, deal in, dispense, distribute, administer, or give away any of the aforesaid drugs without having registered and paid the special tax as imposed by this part, or section 2551(a)." 26 U. S. C. § 3224.

"It shall be unlawful for any person to purchase, sell, dispense, or dis-

The parties here are at odds concerning the effect of the *Falcone* decision as applied to the facts proved in this case. The salient facts are that Direct Sales sold morphine sulphate to Dr. Tate in such quantities so frequently and over so long a period it must have known he could not dispense the amounts received in lawful practice and was therefore distributing the drug illegally. Not only so, but it actively stimulated Tate's purchases.

He was a small-town physician practicing in a rural section. All of his business with Direct Sales was done by mail. Through its catalogues petitioner first made contact with him prior to 1933. Originally he purchased a variety of pharmaceuticals. But gradually the character of his purchases narrowed, so that during the last two years of the period alleged for the conspiracy he ordered almost nothing but morphine sulphate. At all times during the period he purchased the major portion of his morphine sulphate from petitioner. The orders were made regularly on his official order forms. The testimony shows the average physician in the United States does not require more than 400 one-quarter grain tablets annually for legitimate use. Although Tate's initial purchases in 1933 were smaller, they gradually increased until, from November, 1937, to January, 1940, they amounted to 79,000 one-half grain tablets. In the last six months of 1939, petitioner's shipments to him averaged 5,000 to 6,000 half-grain tablets a month, enough as the Government points out to enable him to give 400 average doses every day.

These quantity sales were in line with the general mail-order character of petitioner's business. By printed catalogues circulated about three times a month, it solicits orders from retail druggists and physicians located for the most part in small towns throughout the country. Of annual sales of from $300,000 to $350,000 in the period 1936 to 1940, about fifteen per cent by revenue and two-and-a-half per cent by volume were in narcotics. The mail-order plan enabled petitioner to sell at prices considerably lower than were charged by its larger competitors, who main-

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tribute any of the drugs mentioned in section 2550(a) except in the original stamped package or from the original stamped package; . . . .'' 26 U. S. C. § 2553.

''It shall be unlawful for any person to sell, barter, exchange, or give away any of the drugs mentioned in section 2550(a) except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary.'' 26 U. S. C. § 2554(a).

''It shall be unlawful for any person to obtain by means of said order forms any of the aforesaid drugs for any purpose other than the use, sale, or distribution thereof by him in the conduct of a lawful business in said drugs or in the legitimate practice of his profession.'' 26 U. S. C. § 2554(g).

tained sales forces and traveling representatives. By offering fifty per cent discounts on narcotics, it "pushed" quantity sales. Instead of listing narcotics, like morphine sulphate, in quantities not exceeding 100 tablets, as did many competitors, Direct Sales for some time listed them in 500, 1000 and 5000 tablet units. By this policy it attracted customers, including a disproportionately large group of physicians who had been convicted of violating the Harrison Act.

All this was not without warning, purpose or design. In 1936 the Bureau of Narcotics informed petitioner it was being used as a source of supply by convicted physicians.[4] The same agent also warned that the average physician would order no more than 200 to 400 quarter-grain tablets annually[5] and requested it to eliminate the listing of 5000 lots. It did so, but continued the 1000 and 500 lot listings at attractive discounts. It filled no more orders from Tate for more than 1000 tablets, but continued to supply him for that amount at half-grain strength. On one occasion in 1939 he ordered on one form 1000 half and 100 quarter grains. Petitioner sent him the 1000 and advised him to reorder the 100 on a separate order form. It attached to this letter a sticker printed in red suggesting anticipation of future needs and taking advantage of discounts offered. Three days later Tate ordered 1000 more tablets, which petitioner sent out. In 1940, at the Bureau's suggestion, Direct Sales eliminated its fifty and ten per cent discounts. But on doing so it translated its discount into its net price.

Tate distributed the drugs to and through addicts and purveyors, including Johnson, Black and Foster. Although he purchased from petitioner at less than two dollars, he sold at prices ranging from four to eight dollars per 100 half-grain tablets and purveyors from him charged addicts as much as $25 per hundred.

On this evidence, the Government insists the case is in different posture from that presented in *United States* v. *Falcone*,

[4] Thus, although there were more than 1350 wholesale drug dealers in the United States from whom physicians might order narcotics (Traffic in Opium and Other Dangerous Drugs for the Year Ended December 31, 1941, United States Treasury, Bureau of Narcotics), about 27% of the 204 doctors convicted were petitioner's customers.

[5] Testimony in the record establishes that the practice in the profession is to give one-eighth or one-fourth grain doses, and only rarely one-half grain doses. Cf. United States v. Berman, 258 U. S. 280, 289. Furthermore, there was expert testimony to the effect that codein may be, and preferably is, used for the same medical purposes as morphine sulphate. During the period from 1934 to 1940, however, the record does not show that Tate ever ordered codein from petitioner.

It urges that the effort there was to connect the respondents with a conspiracy between the distillers on the basis of the aiding and abetting statute.[6] The attempt failed because the Court held the evidence did not establish the respondents knew of the distillers' conspiracy. There was no attempt to link the supplier and the distiller in a conspiracy *inter sese*. But in this case that type of problem is presented. Direct Sales was tried, and its conviction has been sustained, according to the claim, on the theory it could be convicted only if it were found that it and Tate conspired together to subvert the order form provisions of the Harrison Act. As the brief puts the Government's view, "Petitioner's guilt was not made to depend at all upon any guilt of Dr. Tate growing out of his relationship to defendants other than petitioner or upon whether these other defendants were linked with the Tate-Direct Sales conspiracy."

On the other hand, petitioner asserts this case falls squarely within the facts and the ruling in the *Falcone* case. It insists there is no more to show conspiracy between itself and Tate than there was to show conspiracy between the respondent sellers and the purchasing distillers there. At most it urges, there were only legal sales by itself to Dr. Tate, accompanied by knowledge he was distributing goods illegally. But this, it contends, cannot amount to conspiracy on its part with him, since in the *Falcone* case the respondents sold to the distillers, knowing they would use the goods in illegal distillation.

Petitioner obviously misconstrues the effect of the *Falcone* decision in one respect. This is in regarding it as deciding that one who sells to another with knowledge that the buyer will use the article for an illegal purpose cannot, under any circumstances, be found guilty of conspiracy with the buyer to further his illegal end. The assumption seems to be that, under the ruling, so long as the seller does not know there is a conspiracy between the buyer and others, he cannot be guilty of conspiring with the buyer, to further the latter's illegal and known intended use, by selling goods to him.

The *Falcone* case creates no such sweeping insulation for sellers to known illicit users. That decision comes down merely to this, that one does not become a party to a conspiracy by aiding and abetting it, through sales of supplies or otherwise, unless he knows of the conspiracy; and the inference of such knowledge cannot be drawn merely from knowledge the buyer will use the goods illegally. The Government did not contend, in those cir-

[6] R. S. § 5323, 18 U. S. C. § 550.

cumstances, as the opinion points out, that there was a conspiracy between the buyer and the seller alone. It conceded that on the evidence neither the act of supplying itself nor the other proof was of such a character as imported an agreement or concert of action between the buyer and the seller amounting to conspiracy. This was true, notwithstanding some of the respondents could be taken to know their customers would use the purchased goods in illegal distillation.

The scope of the concession must be measured in the light of the evidence with reference to which it was made. This related to both the volume of the sales and to casual and unexplained meetings of some of the respondents with others who were convicted as conspirators. The Court found this evidence too vague and uncertain to support a finding the respondents knew of the distillers' conspiracy, though not inadequate in some instances to sustain one that the seller knew the buyer would use the goods for illegal distilling. It must be taken also that the Government regarded the same evidence as insufficient to show the seller conspired directly with the buyer, by selling to him with knowledge of his intended illegal use.

Whether or not it was consistent in making this concession and in regarding the same evidence as sufficient to show that the sellers knew of and joined the buyers' distilling ring is not material. Nor need it be determined whether the Government conceded too much. We do not now undertake to say what the Court was not asked and therefore declined to say in the *Falcone* case, namely, that the evidence presented in that case was sufficient to sustain a finding of conspiracy between the seller and the buyer *inter sese*. For, regardless of that, the facts proved in this case show much more than the evidence did there.

The commodities sold there were articles of free commerce, sugar, cans, etc. They were not restricted as to sale by order form, registration, or other requirements. When they left the seller's stock and passed to the purchaser's hands, they were not in themselves restricted commodities, incapable of further legal use except by compliance with rigid regulations, such as apply to morphine sulphate. The difference is like that between toy pistols or hunting rifles and machine guns. All articles of commerce may be put to illegal ends. But all do not have inherently the same susceptibility to harmful and illegal use. Nor, by the same token, do all embody the same capacity, from their very nature, for giving the seller notice the buyer will use them unlawfully. Gangsters, not hunters or small boys, comprise the normal private market for machine guns. So drug addicts fur-

nish the normal outlet for morphine which gets outside the restricted channels of legitimate trade.

This difference is important for two purposes. One is for making certain that the seller knows the buyer's intended illegal use. The other is to show that by the sale he intends to further, promote and cooperate in it. This intent, when given effect by overt act, is the gist of conspiracy. While it is not identical with mere knowledge that another purposes unlawful action, it is not unrelated to such knowledge. Without the knowledge, the intent cannot exist. *United States* v. *Falcone, supra.*[7] Furthermore, to establish the intent, the evidence of knowledge must be clear, not equivocal. *Ibid.* This, because charges of conspiracy are not to be made out by piling inference upon inference, thus fashioning what, in that case, was called a dragnet to draw in all substantive crimes.

The difference between sugar, cans, and other articles of normal trade, on the one hand, and narcotic drugs, machine guns and such restricted commodities, on the other, arising from the latters' inherent capacity for harm and from the very fact they are restricted, makes a difference in the quantity of proof required to show knowledge that the buyer will utilize the article unlawfully. Additional facts, such as quantity sales, high pressure sales methods, abnormal increases in the size of the buyer's purchases, etc., which would be wholly innocuous or not more than ground for suspicion in relation to unrestricted goods, may furnish conclusive evidence, in respect to restricted articles, that the seller knows the buyer has an illegal object and enterprise. Knowledge, equivocal and uncertain as to one, becomes sure as to the other. So far as knowledge is the foundation of intent, the latter thereby also becomes the more secure.

The difference in the commodities has a further bearing upon the existence and the proof of intent. There may be circumstances in which the evidence of knowledge is clear, yet the further step of finding the required intent cannot be taken. Concededly, not every instance of sale of restricted goods, harmful as are opiates, in which the seller knows the buyer intends to use them unlawfully, will support a charge of conspiracy.[8] But this is not to say that a seller of harmful restricted goods has license to sell in un-

[7] Although this principle was there applied to aiding and abetting a conspiracy among others, it has at least equal force in a situation where the charge is conspiring with another to further his unlawful conduct, without reference to any conspiracy between him and third persons.

[8] This may be true, for instance, of single or casual transactions, not amounting to a course of business, regular, sustained and prolonged, and involving nothing more on the seller's part than indifference to the buyer's

limited quantities, to stimulate such sales by all the high-pressure methods, legal if not always appropriate, in the sale of free commodities; and thereby bring about subversion of the order forms, which otherwise would protect him, and violation of the Act's other restrictions. Such a view would assume that the market for opiates may be developed as any other market. But that is not true. Mass advertising and bargain counter discounts are not appropriate to commodities so surrounded with restrictions. They do not create new legal demand and new classes of legitimate patrons, as they do for sugar, tobacco and other free commodities. Beyond narrow limits, the normal legal market for opiates is not capable of being extended by such methods. The primary effect is rather to create black markets for dope and to increase illegal demand and consumption.

When the evidence discloses such a system, working in prolonged cooperation with a physician's unlawful purpose to supply him with his stock in trade for his illicit enterprise, there is no legal obstacle to finding that the supplier not only knows and acquiesces, but joins both mind and hand with him to make its accomplishment possible. The step from knowledge to intent and agreement may be taken. There is more than suspicion, more than knowledge, acquiescence, carelessness, indifference, lack of concern. There is informed and interested cooperation, stimulation, instigation. And there is also a "stake in the venture" which, even if it may not be essential, is not irrelevant to the question of conspiracy.[9] Petitioner's stake here was in making the profits which it knew could come only from its encouragement of Tate's illicit operations. In such a posture the case does not fall doubtfully outside either the shadowy border between lawful cooperation and criminal association or the no less elusive line which separates conspiracy from overlapping forms of criminal cooperation.

Unless, therefore, petitioner has been exempted arbitrarily by the statute's terms, the evidence clearly was sufficient to sustain

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illegal purpose and passive acquiescence in his desire to purchase, for whatever end. A considerable degree of carelessness coupled with casual transactions is tolerable outside the boundary of conspiracy. There may be also a fairly broad latitude of immunity for a more continuous course of sales, made either with strong suspicion of the buyer's wrongful use or with knowledge, but without stimulation or active incitement to purchase.

[9] Cf. United States v. Falcone, 109 F. 2d 581 (C. C. A.); and compare Backun v. United States, 112 F. 2d 635, 637 (C. C. A.); United States v. Harrison, 121 F. 2d 930, 933 (C. C. A.); United States v. Pecoraro, 115 F. 2d 245, 246 (C. C. A.).

its conviction for conspiring with Tate. Its position here comes down ultimately to the view alluded to above that the statute has, in fact, thus immunized its action. In effect this means the only restriction imposed upon it, apart from other provisions not now material, such as those affecting registration, was the requirement it should receive from purchasing physicians a signed order form for each sale. That done, in its view, its full duty to the law was fulfilled, it acquired a complete immunity, and what the physician had done or might do with the drugs became of no further concern to itself. Such a view would legalize an express written agreement between a registered wholesaler and a physician for the former to supply him with all his requirements for drugs for both legal and illegal distribution, conditioned only upon his using the required order forms. The statute contains no such exemption in explicit terms. Nor was one implied.[10]

This being true, it can make no difference the agreement was a tacit understanding, created by a long course of conduct and executed in the same way.[11] Not the form or manner in which the understanding is made, but the fact of its existence and the further one of making it effective by overt conduct are the crucial matters. The proof, by the very nature of the crime, must be circumstantial[12] and therefore inferential to an extent varying with the conditions under which the crime may be committed. But this does not mean either that the evidence may be equivocal or that petitioner is exempt from its effects when it is not so, merely because in the absence of excesses such as were committed and in other circumstances the order form would have given it protection. It follows the mere fact that none of petitioner's representatives ever met Dr. Tate face to face or held personal communion with him is immaterial. Conspiracies, in short, can be committed by mail and by mail-order houses. This is true, notwithstanding the overt acts consist solely of sales, which but for their volume, frequency and prolonged repetition, coupled with the seller's unlawful intent to further the buyer's project, would be wholly lawful transactions.

Accordingly, the judgment is

Affirmed.

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[10] Cf. Gebardi v. United States, 287 U. S. 112; see also 81 U. of Pa. L. Rev. 474.

[11] Glasser v. United States, 315 U. S. 60, 80; United States v. Manton, 107 F. 2d 834, 839 (C. C. A.); United States v. Harrison, 121 F. 2d 936, 934 (C. C. A.); cf. Eastern States Retail Lumber Dealers' Ass'n v. United States, 234 U. S. 600; Interstate Circuit, Inc. v. United States, 306 U. S. 208.

[12] *Ibid.*